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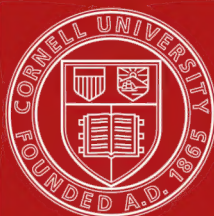
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A digest of the American corporation cas



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A DIGEST

OF THE

AMERICAN CORPORATION CASES,

PRESENTING THE AMERICAN JUDICATIONS

EMBRACED IN THE DECISIONS OF

THE SUPREME COURT OF THE UNITED STATES, AND
THE COURTS OF LAST RESORT IN THE SEVERAL
STATES AND TERRITORIES SINCE JANUARY
1, 1868, OF QUESTIONS PECULIAR

TO THE

LAW OF CORPORATIONS.

COMPILED BY

HENRY BINMORE,
OF THE CHICAGO BAR.

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DIGEST

OF THE

AMERICAN CORPORATION CASES.

ABATEMENT OF ACTION.

1. CONSOLIDATION OF COMPANIES. A consolidation of a defendant corporation with other companies, under a statute which continues its liabilities, is not such a dissolution of the corporation as will abate an action brought before such consolidation was effected; *East Tenn. & Ga. R.R. Co. v. Evans*, 4-186.

2. CONSOLIDATION; EFFECT. Where a suit is pending against a corporation, at the time of its consolidation with another company, the plaintiff has a right to treat it as continuing to have a separate existence for the prosecution of his action against it; *Shackelford v. Miss. Cent. R.R. Co.*, 8-31.

3. ACTION FOR PENALTY. Action for the recovery of a statutory penalty does not survive the death of defendant; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

ACADEMY.

1. POWER TO BORROW MONEY. The power to borrow money may be fairly implied as a usual and appropriate means to accomplish the object of a charter granted to an academical corporation; *Moss v. Harpeth Academy*, 4-133.

2. DEVISE OF REALTY. An academy incorporated for the promotion of literature, authorized to educate male and female students, may lawfully establish separate departments for each sex. Under the laws of New York (1840-1) it may take and hold real estate devised to it in trust, for the benefit of either department; *Adams et al. v. Perry et al.*, 3-623.

3. —. A devise to an incorporated academy, for the promotion of literary education, is not void because it provides that the daughters of officers, soldiers, etc., who have been killed, or died, while in the service of the United States etc., together with girls and young ladies in needy and indigent circumstances, shall receive their tuition free. Such a provision does not constitute a trust in favor of such daughters, girls and young ladies, or render

them the beneficiaries. If they attend they receive their instruction free, otherwise, not; the academy takes the subject of the devise to its own uses and purposes, subject to any valid trust and condition attached thereto. *Id.*

4. **DEVISE OF PERSONAL PROPERTY.** A bequest of personal property to invest and re-invest, and pay over the income to an incorporated academy, forever, creates a perpetuity contrary to the statute of New York, and is, therefore, void. *Id.*

5. **NOT FOR PROFIT.** A corporation for educational purposes, as an academy, is not one for pecuniary profit, merely because fees are charged for tuition; *Santa Clara Academy v. Sullivan*, 10-298.

See **COLLEGE**; **EDUCATIONAL INSTITUTION**; **UNIVERSITY**.

ACKNOWLEDGMENT OF DEED.

1. **BY A TRUSTEE.** An acknowledgment of a deed by a trustee, empowered by his corporation to act with others, before himself, renders the deed void as to him. Such acknowledgment will not, however, adversely affect the instrument as to co-trustees who act; *Darst v. Gale et al.*, 6-380.

2. **WHO TO ACKNOWLEDGE.** In the absence of a statutory provision prescribing the mode of executing and acknowledging a corporate deed, the officer who affixes the seal executes it, within the meaning of statutes requiring deeds to be acknowledged by the grantor; *Kelly v. Calhoun*, 6-26.

3. **VALID ACKNOWLEDGMENT.** The statute prescribing for form of acknowledgment thus: "personally appeared before me ———, the within named bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." Certificate of an officer taking the acknowledgment of the grantor to a deed executed by a proper officer of a corporation, that said grantor is personally known to him, is a sufficient compliance with the statute. *Id.*

ACTION.

1. **PRACTICE; VENUE.** Corporations can not be sued in any other than the courts of their domicile, for damages arising out of their passive breaches of contract. A statute which provides in all cases where a corporation shall commit trespass, or do any thing for which an action for damages lies, it shall be liable to be sued in the parish where such damage is done, or trespass committed, relates exclusively to actions for damages caused by positive acts of commission; it does not include actions for damages resulting from acts of omission, as neglects, failures and the like; *Montgomery v. The La. Levee Co.*, 7-218.

2. **PARTICULAR PROVISIONS AS TO.** Particular provisions for the bringing of suits against corporations formed under a general law,

must apply and operate in the same manner as would like provisions in a special charter; *Dewey v. Central Car & Manuf. Co.*, 6-642.

3. PARTICULAR PROVISIONS AS TO. Where a general incorporation law contains provisions regulating the bringing of suits against corporations organized under it, such provisions must be regarded as exceptions to earlier general provisions on the same subject, if there be an inconsistency between these. *Id.*

4. AGAINST A MUNICIPAL CORPORATION. An action may be maintained against a municipal corporation for a tort resulting in an injury to a person; *Mayor and aldermen of the city of Savannah v. Cullins*, 2-132.

5. —. Such an action can be maintained against a municipal corporation by one of its members. *Id.*

6. TROVER, FOR CONVERSION OF STOCK. An action of trover will lie for the wrongful conversion of shares of stock in an incorporated company; *Nabring v. Bank of Mobile*, 6-124.

7. TROVER, WHEN NOT LIE. Where the legal title of shares of stock has been placed by pledgor, in pledgee, the supreme court of Alabama is inclined to agree that trover will not lie; but, in such case the form of action must be objected to in the trial court; whereupon, plaintiff might amend, by adding a count in case, for the same cause of action and recover upon case made. *Id.*

8. RECoupMENT OF DEBT OWING. In an action of trover, for the wrongful conversion of shares of stock, which have been pledged, as security for the re-payment of money borrowed, pledgee may recoup the debt of defendant to him. *Id.*

9. FOR PENALTY; DEFENDANT DEAD. An action to recover a statutory penalty does not survive the death of the defendant, and a writ of error, from the appellate court, to reverse a judgment in favor of the defendant against his executors is properly dismissed; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

ACTION ; PARTIES TO.

1. WHEN NOT LIE. A society which is not authorized by law to become incorporated can not institute suit, for the collection of moneys, in its society name; *Detroit Schutzen Bund v. Detroit Agitations Verein*, 6-651.

2. RIGHT TO SUE. No association of persons can appear in court, as a corporation, unless organized, as such, in strict accordance with law. Unless so organized such persons can sue only as individuals and in their names as such; *Workingmen's Accommodation Bank v. Converse et al.*, 7-203.

3. PRIVATE PERSON ; PUBLIC MATTER. A citizen can not, in his individual capacity, maintain an action to control the conduct of public officers which inflicts no special injury upon him; *Conklin v. County Commissioners of Fillmore County*, 2-558.

4. **IN ACTION AT LAW.** In a suit, against the members of an association, for services rendered, the name of a person, which was signed to the articles of association, without authority or ratification, may properly be omitted as a defendant; *Boyd v. Merriell*, **3-260.**

5. **IN ACTIONS FOR VIOLATION OF TRUSTS.** When the property of a corporation was conveyed to trustees to secure the payment of debts and was sold, without judicial proceedings, in the execution of a power attempted to be conferred by the terms of the deed, but which was invalid because of a statute requiring that all such sales should be made by proceedings in court, it was held; (1) that the purchaser was answerable for the proceeds of the property; (2) that the corporation was a necessary and indispensable party to any proceedings for its recovery; *Samuel v. Holladay*, **1-139.**

6. **IN ACTION TO ABATE NUISANCE.** An action to recover money expended from the treasury of a city or town, by its board of health, to remove a nuisance, may be maintained in the name of such city or town; *City of Salem v. The Eastern R.R. Co.*, **2-429.**

7. **ACTION BY STOCKHOLDERS.** When the proceedings were instituted by two stockholders in behalf of themselves and all others who might come in and take part in the litigation; and it appeared that the bill was pending six years without service on the corporation, that if the suit should be successful the property would be absorbed in the payment of debts, leaving nothing to be distributed among stockholders, and that the interests of the plaintiffs, by reason of the small amount of stock held by them, was nominal, merely, the court refused to order that the cause should stand over for service upon the corporation; *Samuel v. Holladay*, **1-139.**

8. **ILLINOIS AND MICHIGAN CANAL.** In an action, on the case, brought against the board of trustees of the Illinois and Michigan canal, to recover damages for the loss of a canal boat, occasioned, as alleged, by the negligence of the defendant, held, that the action was alone maintainable against the state trustee, and would not, therefore, lie against the defendants as a board of trustees; *Board of Trustees of the Illinois & Michigan Canal v. Daft*, **1-423.**

9. **CREDITOR'S BILL.** Neither the bond nor stockholders of a corporation are necessary parties to a creditor's bill seeking to subject assets to the payment of debts, where they are represented by the parties before the court; *Chicago, Rock Island & Pacific R.R. Co. v. Howard et al.*, **1-1.**

10. **PARTNERSHIP TO CARRY ON CORPORATION.** Where some of the members of an incorporated company form a partnership, between themselves, for the purpose of carrying on the business of the company, under a lease, upon bill filed by one of the partners, for a dissolution and a settlement of the partnership affairs, the

corporation is neither a necessary nor a proper party ; *Faulds v. Yates*, **3-289**, note 3.

11. **INSOLVENCY OF BANK.** The receiver, holding the assets of an insolvent national bank, is a proper party in proceedings for the adjudication of claims against the bank ; *Turner v. First National Bank of Keokuk et al.*, **3-298**.

12. **RECEIVER.** The insolvent corporation had gone into the hands of a receiver, and it was held that a suit to recover the moneys received by the stockholders was properly brought by the receiver ; *Crandall v. Allen*, **10-102**.

13. **MULTIFARIOUS.** A demurrer to a bill filed by a great number of persons, owning distinct parcels of land fronting upon a street, to restrain the collection of a tax levied on their several parcels for grading the street, on the ground that it is multifarious, will not be sustained when the questions presented by the bill appear, *prima facie*, to depend upon the same proceedings for assessing the tax. If, in the progress of the cause, it is developed that the multiplicity of issues or other complications, growing out of the joinder, would produce embarrassment, to more than balance the advantages to be derived from settling the whole in one suit, the court may, in the legitimate exercise of its powers, on its own motion, dismiss the bill ; *Schofield et al. v. City of Lansing et al.*, **2-538**.

14. **STATE : CITIZEN.** The state of Georgia, being a stockholder in a railroad company, may, on her own motion, become a party to a bill filed by other persons in interest against defendants to enjoin the consummation of a contract by which a controlling amount of the stock in which it is interested, as a stockholder, is about to pass into the control of other and competing companies. A citizen of the state, as such, is not a proper party to a bill, the object of which is to enjoin the defendant railroad companies from making a purchase of stock in another railroad company ; *Central R.R. Co. et al. v. Collins et al.*, **3-224**.

15. **ANOTHER ACTION PENDING ; NEW PARTY.** It is not a sufficient answer to a plea of another action pending in a court of competent jurisdiction, that the case at bar involves an additional issue and another party. The issue joined in the action pending will remain in and be decided by the court in which the original action is ; *City of Memphis v. Dean*, **3-1**.

ACTION, RIGHT OF.

1. **ATTACHMENT AGAINST FOREIGN CORPORATION.** The legislature of Kentucky conferred upon a foreign corporation all the privileges, rights and immunities, subject to all such restrictions as were granted, made and prescribed for the benefit, government and direction of the company by an act of incorporation passed by the legislature of Alabama. Held, that unless the property and effects of the corporation could be attached for a mere failure

to pay its liabilities in the state of its creation, they could not be so attached in Kentucky, notwithstanding a provision in the civil code of Kentucky, to the contrary effect, but which had been enacted subsequent to the passage of the act conferring such privileges and immunities; *Martin & Merriwether v. Mobile & Ohio R.R. Co.*, **3-339**.

2. **PRIOR MORTGAGE.** Where property attached had been previously mortgaged to pay certain outstanding debts, of which those of plaintiff constituted a part, plaintiffs could not appropriate such mortgaged property to the payment of their debts, without alleging that the residue of the indebtedness secured had been paid, and bringing the trustees or legal title holders before the court. *Id.*

3. **TAXES ILLEGALLY COLLECTED.** The sheriff, as collector, having wrongfully levied upon the currency, belonging to the bank, sufficient to satisfy the tax and fees for collection, the bank is entitled to recover the same, as in an action of trespass; *Smith v. First National Bank of Tecumseh*, **3-485**.

4. **BANK CHECK.** The holder of a bank check can not sue the bank for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer. There is no privity of contract between the holder of a check and the bank. The holder receives the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. No duty is owing from the bank to the holder until the check is presented and accepted; *Bank of the Republic v. Millard*, **3-22**.

5. —. The fact that a check was drawn on a public depository, by an officer of the government, in favor of a public creditor, can not change the right of the parties. *Id.*

6. **ACTION AGAINST TRUSTEES.** The general rule is that an action against trustees of a corporation, for a misappropriation of its funds, must be brought in the name of the corporation. An exception to this rule is when a corporation, on proper demand, from a stockholder, refuses to bring suit. In such case stockholders may sue in their own names; *Cogswell v. Bull*, **3-129**.

7. **REMEDY AGAINST DELINQUENT SUBSCRIBER FOR STOCK.** The remedy against a delinquent subscriber is to enforce payment by a judgment for the money and not by a forfeiture or sale of the stock; *Gills, Adm'x, v. Kentucky, etc., Mining Co.*, **3-346**.

8. **TRANSFER OF STOCK.** To allow stock, the certificates of which are held by a bona fide holder, to be transferred to another without his consent is a breach of corporate duty, for which an action will lie; *National Bk. v. Lanier*, **3-74**.

9. **MISAPPROPRIATION OF PROPERTY.** Where there is a misappropriation of property by the trustees of a corporation — in this case of all the property of a canal company, to the use of a railroad corporation — at a price far below the actual value of the prop-

erty, the stockholders of the sold out property can not, after it is converted to the new purpose, reclaim the property or enjoin its new use. So far, however, as regards the price of the property they are not concluded by the wrongful agreement. They may, by action, compel the company which acquired the property to account for its value; *Goodin v. Cincin. etc. Canal Co. et al.*, 3-652.

10. **DIRECTORS AS TRUSTEES.** Directors are treated as trustees for stockholders; wherefore, a stockholder will be allowed, in a proper case, to maintain a suit in equity to restrain them from doing acts which may be within the corporate authority, but, which would be in violation of the trust, or he may procure redress, for such acts, after they have been performed; *Wright v. Oroville Gold etc. Mining Co.*, 3-146.

11. **JURISDICTION OF EQUITY.** Courts of equity, as between the corporation and its officers, on the one hand, and the stockholders, on the other, in the management of the corporate affairs, look beyond the mere observance of forms of law and inquire if the authority has been, in good faith, exercised to promote the interest of the stockholders. *Id.*

12. **MANDAMUS TO PRODUCE ACCOUNTS.** By statute of Connecticut, joint stock corporations are required to keep all books of account, of such corporations, open for the examination of stockholders, at the town within said state in which the corporation is located, or at the office of the treasurer in such state. So, where the company's manufactory was located in the state but its principal office for the sale of its wares was in New York, it was held that its books of account should be kept at its office in Connecticut. Nevertheless it would not be prohibited from keeping books of account in New York, and mandamus would not issue to compel their production in Connecticut, as the suit of a stockholder who does not show some injury to himself; *Pratt v. Meriden Cutlery Co.*, 3-103.

13. **LIABILITY FOR PROFITS.** A contractor agreed to construct and equip a company's railroad line for \$1,600,000, of which sum \$250,000 were to be paid in cash and cash assets and the balance in bonds and stock of the company, the price named being twice the cash value of the work. Payments were to be made on monthly estimates, in such class of property as should best subserve the purposes of the contractor. No time was fixed for the completion of the work. The contractor performed work, under the contract, to the nominal value of \$117,000, which was paid for, mostly, in the cash assets, and, then the charter of the company expired by its own limitation, the work was suspended by mutual consent, the road abandoned and its stock and bonds became worthless. The contractor was held bound to account for all actual profits realized; *Four Mile V. R.R. Co. v. Bailey*, 3-659.

14. **DEFAULT IN PAYMENT FOR STOCK.** The law raises a promise to pay for stock subscribed for as it is lawfully assessed and de-

mandable. The common law affords a remedy for recovery by action of assumpsit. Subsequent enactments authorizing forfeiture and sale of the stock are cumulative as to the remedy; *Hughes v. Antietam Manuf. Co.*, 3-377.

See BAR TO ACTION; RIGHT OF ACTION.

AGENCY.

1. GENERAL RULE. A corporation may, unless otherwise provided by its charter, by resolution or by-law, appoint any person an agent for the purpose of transferring or disposing of its property or negotiable securities; *Mitchell v. Deeds*, 1-461.

2. —. No officer of the corporation possesses such exclusive power, unless conferred by charter. *Id.*

3. INFERENCE OF AUTHORITY. In the absence of both statutory authority and regulations of the corporate body, if the proof shows that the president was in the habit of exercising such power, then his authority to so act may be inferred. *Id.*

4. IMPLICATIONS AS TO. The rule is that not only the appointment but the authority of the agent of a corporation may be implied by the adoption, or recognition, of his acts by the corporation; *Southgate v. Atlantic & Pacific R.R. Co.*, 8-144.

5. APPOINTMENT. The entry upon the records of a corporation of the resolution appointing an agent is not essential to the validity of the appointment, unless the charter, statute or by-laws are not merely directory, in this particular, but render it absolutely essential; *Smiley v. Mayor and aldermen of Chattanooga*, 4-185.

6. IMPLICATION OF APPOINTMENT. The authority of an agent of a corporation may be implied from the adoption or recognition of his acts by the corporation or its directors. *Id.*

7. EVIDENCE OF APPOINTMENT. In the absence of ex officio power, on the part of a director or vice president of a corporation, his authority as agent must be shown by some competent testimony. In the absence of testimony it can not be presumed from the mere fact that he assumed to act as agent. Such authority may be shown in various ways; as by resolution of the board of directors; or, by verbal appointment under their authority, or with their approbation; or, by proof of acts of agency, with the knowledge of the directors, who tacitly acquiesced or took no action to prevent it; *Chicago & Northwestern Ry. Co. v. James et al.*, 4-218.

8. HOW EVIDENCED. Agency for a corporation is not required to be shown by a resolution of the board of directors, or other written evidence, but it may be inferred from facts and circumstances; *Santa Clara Mining Ass'n v. Meredith*, 7-396.

9. OF CORPORATIONS. Where a corporation is created by each of two states, to control the same substance in a joint business, there are, in fact, two corporations with a common purpose, standing in the relation of co-partners. Each is the agent of the

other in the management of their common business, and each is bound by the act of the other in the legitimate prosecution and protection of their joint business; *Newport & Cin. Bridge Co. v. Woolley*, 7-184.

10. **POWERS OF; GENERAL RULE.** Public officers or agents are held more strictly within their prescribed powers than private general agents. A contract made by a public agent, within the general scope of his powers, does not bind his principal in the absence of specific authority; *Parcel v. Barnes & Bro.*, 2-39.

11. **IMPLIED POWER; ESTOPPEL.** An attempt to imply authority to sell stock from other acts of the agent of a different character, done without authority, but approved by the principal, does not constitute an estoppel; *Woodhouse v. Crescent Mut. Ins. Co.*, 10-472.

12. **AUTHORITY.** Where one deals with a corporation through one of its members, he must, though himself a member, take the peril of the authority of the one, through whom he deals, to act as agent of the corporation and that his acts are within the scope of his authority; *Rice v. Peninsular Club*, 10-621.

13. —. A party dealing with another, supposing him to be an agent, is not protected by the latter's assumption of authority to act. *Id.*

14. —. Power to employ an agent or servant, unless there are restrictive words, includes authority to make a complete express contract, definite as to the amount of wages, etc. So, where the assistant superintendent of a railroad, in transferring one of its depot agents to another station, by order of the superintendent, agreed that such agent should have a stipulated price per month at the new place, the company was held bound by the agreement; *Ala. Great Southern R.R. Co. v. Hill*, 10-40.

15. **RATIFICATION.** An act by trustees which is prohibited by law can not be made valid by ratification; *Martin v. Zellerbach*, 1-170.

16. —. A city can not ratify the unauthorized act of its agent, in so far as the same affects the rights of third persons; *Meuser v. Risdon et al.*, 2-101.

17. —. The appropriation by a corporation of money received on a promissory note, executed as the instrument of the company by an agent not thereto authorized, in the payment of the company's debts, is a ratification of the unauthorized act and makes the note a valid note of the company; *Windham Provident Institute for Savings v. Sprague*, 4-199.

18. **RATIFICATION BY SILENCE.** Where an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to the presumption of an intentional ratification of the unauthorized act. Before such inference can be drawn from silence, however, there must have been afforded an opportunity to act or speak upon a full understanding of the circumstances,

and these circumstances must be such as would properly and naturally call for some action or reply from men similarly situated; *Union Gold Mining Co. v. Rocky Mountain National Bank*, **4-298**.

19. RATIFICATION — CASE STATED. The president of a corporation, without authority, signed the corporate name to a contract; the secretary was one of two agents with full power in the premises, and, as such agent, had full knowledge; the other agent knew there was a contract and knew some of its provisions, with every facility for informing himself fully; he and the president were directors of the corporation; a supplemental agreement, which could not be understood without knowledge of the contract, was signed by the secretary of the corporation and was fully performed by the corporation; the contract was partially executed by the plaintiff, as to the time, and, so far as the motives and purposes of the defendants were concerned, was fully executed; and the execution of the contract was connected with important and radical changes in the business affairs of the corporation. There being no pretense that any officer, or other person connected with the company, ever intimated any objection to the contract; held, there had been a ratification of the contract; *Perry v. Simpson Waterproof Manuf. Co.*, **4-309**.

20. RATIFICATION. Where the secretary of a corporation, without express authority, pledges the bonds of the company, secured by deed of trust, which is recorded, for an existing indebtedness and future advances, the directors of the corporation having knowledge of and acquiescing in such pledge, the act will be binding in the absence of proof of fraud. The principle that a subsequent ratification is equivalent to a prior authority will apply; *Darst v. Gale et al.*, **6-380**.

21. DISAVOWAL. Where delay, on the part of the principal, to disavow the agency will result in loss, and where the transaction may turn out a profit or loss according to circumstances, the principal must disavow the unauthorized act of the agent within a reasonable time after notice; *Union Gold Mining Co. v. Rocky Mountain National Bank*, **4-298**.

22. PAROL CONTRACTS BY AGENTS. A corporation acting within the scope of its authority is bound by the parol contract of its authorized agent, the same as an individual under like circumstances; *Racine & Mississippi R.R. Co. v. Farmers Loan and Trust Co.*, **1-441**.

23. NOTICE TO PRINCIPAL THROUGH AGENT. The act and knowledge of an agent transacting the business, are the acts and knowledge of the principal; *Singer Manuf. Co. v. Holdfodt*, **6-402**.

24. KNOWLEDGE OF, AFFECTS PRINCIPAL. The knowledge of an agent, in matters pertaining to his agency and within the scope of his authority, is the knowledge of the principal. This principle is peculiarly applicable to corporations, which must transact

their business through agents; *Perry v. Simpson Waterproof Manuf. Co.*, 4-309.

25. NOTICE TO CO-AGENT. Where a corporation has two agents, of equal power and authority, notice to one is constructive notice to the other and, therefore, notice to the corporation. *Id.*

26. ADMISSION OF, WHEN BINDING. A corporation may be bound by the language of its agent; as where a superintendent of a street railway company admitted and justified an assault by one of its drivers; *Malacek v. Tower Grove & Lafayette Ry. Co.*, 8-120.

27. PRESUMPTION AS TO. The habitual exercise of power by the cashier of a bank, with the knowledge and acquiescence of the bank, establishes, as to the public, the existence of such powers as fully as the same could be established by the order of the board of directors; *Merchants National Bank v. State National Bank*, 3-25.

28. PRESUMPTION. One openly and notoriously exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority from the corporation to so act; *Singer Manuf. Co. v. Holdfodt*, 6-402.

29. IN MANAGING BUSINESS. In respect to the management of the business of a corporation, a general managing agent and superintendent represents the corporation and may do, in the transaction of ordinary affairs, all the corporation may do within the scope of its powers; *M'Kiernan v. Lenzen*, 6-264.

30. CHARACTER OF ACTS OF. If the business of a corporation is transacted by a general managing agent, who is suffered to exercise general authority in respect to its business, the corporation is bound by his acts within the scope of the powers assumed by him, as if these powers were expressly granted. *Id.*

31. LIABILITY FOR ACTS OF. In the absence of an express charter provision to the contrary, the acts of an agent of a corporation, within the scope of his authority, bind his principal to the same extent and in the same manner as though he were acting for a natural person; *City of Covington v. Covington & Cincinnati Bridge Co.*, 5-388.

32. LIABILITY FOR HIS ACTS. As against strangers, it is immaterial whether one, who openly and with knowledge of a corporation, acts as a managing director received a specific appointment to that position from the board of directors, or not; if he has long acted in that capacity without objection, his services have been accepted and the benefit thereof appropriated to the company's use; *Walker v. Detroit Transit Ry. Co. et al.*, 7-582.

33. ACTS PERFORMED IN PUBLIC. If an officer of a corporation is continuously suffered to exercise general authority, in the corporate business, the company may become bound by his acts, within the scope of the powers so assumed, as if the authority had been expressly granted; *Union Gold Mining Co. v. Rocky Mount. Nat. Bk.*, 5-176.

34. **UNLAWFUL PROFITS.** An agent can not make profits, out of his principal, in the business of his agency; nor can partners or associates of their co-associates for whom they have undertaken to act; *Simons et al. v. Vulcan Oil and Mining Co.*, 4-80.

35. **PURCHASE OF CLAIMS BY AGENT.** The purchase of claims against a corporation by an agent thereof does not extinguish the indebtedness of the principal, unless the corporation furnishes or refunds the money. It remains, even when the purchase is made without authority, liable to the agent for the amount expended in the purchase; *Sullivan v. Triunfo Gold and Silver Mining Co.*, 3-132.

36. **AS DISTINCT FROM TRUSTEESHIP.** The treasurer of a corporation — in this case a savings bank — being instructed by a vote of the finance committee to sell certain rights to take stock in the corporation, the property of the corporation, for not less than a sum named, undertaking to do so, acts as an agent of the corporation, and, not as a trustee, nevertheless he is, also, a trustee of the corporation and a member of its finance committee. If the treasurer immediately sells the rights to himself and other members of the committee for the price named, which is less than the market value of the rights, not making any attempt to procure purchasers at a higher rate, and pays to the corporation the money so obtained, the corporation may, without returning the money, maintain an action at law, against him, to recover the difference between the market value of the rights and the price obtained; but is not entitled to dividends paid on the stock represented by the rights; *Greenfield Savings Bank v. Simons*, 9-451.

37. **ACTS OF ATTORNEY.** Where notice of the revocation of a contract with a corporation is prepared and served upon the other party by an attorney of the company, with the knowledge and consent of its manager, the company and its manager will be bound by the act of the attorney, and not be allowed to dispute the attorney's authority; *Parmly v. Buckley et al.*, 9-149.

38. **CONVEYANCE OF LAND BY.** No body corporate can appoint an agent to convey lands, except by a vote of its directors or managing board, in whom the power to sell may be reposed by charter or by general law; *Standifer v. Swann & Billups*, 10-49.

39. **AUTHORITY TO DRAW BILLS MAY BE CONFERRED BY PAROL.** The officers of a corporation, in the absence of a prohibition by the charter of the company, may confer authority, upon the corporate agent, to draw and execute bills of exchange on behalf of the company. Action in writing, on the part of the board of directors, is not necessary to vest such authority in the agent; *Preston v. Missouri & Pennsylvania Lead Co.*, 8-86.

40. **SIGNATURE BY AGENT.** It is competent for an agent to sign simply the name of the principal. The fact that it was placed there by an agent need not appear on the paper; *First National Bank of Rock Island, Illinois, v. Loyhed*, 8-11.

41. **PROMISSORY NOTE.** The secretary of a corporation executed a promissory note in which were the words "we promise," etc., and to which was affixed the seal of the corporation and his own name, with the word "Secretary" appended. It was held to be the note of the corporation, on which the secretary was not individually liable; *Means et al. v. Swormstedt*, 1-370.

42. **UNDISCLOSED PRINCIPAL.** If an agent, who is authorized to execute a promissory note, shall execute such note in his own name, whether he discloses his principal or not, such principal may be sued on the note; unless it is made clear that both parties to the contract intended that the agent alone should be liable; and parol evidence is admissible to prove the intent; *Ferris v. Thaw et al.*, 8-205.

43. **AS TO PROMISSORY NOTE.** The issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining. Neither the general agent nor the president and secretary of such a company, unless authorized by the board of directors so to do, can bind the corporation by a note made in its name; *New York Iron Mine Co. v. First Nat. Bk. of Negaunee*, 6-612.

44. —. A mine in Michigan was the property of a corporation which had its financial office in New York. The general agent, at the location of the mine, was accustomed to indorse negotiable paper, belonging to the company, for collection or discount, and draw on the treasurer, in New York, for money needed for the purposes of the corporation. These drafts were paid. This course of dealing would imply an authority in the agent to execute promissory notes in the name of the corporation. *Id.*

45. **INNOCENT SUFFERER.** The principle of law, that where one of two innocent parties must suffer from the dishonesty of a third, that one shall bear the loss who, by his negligence, has enabled the third to occasion it, can not be successfully invoked by a party who is not, himself, entirely innocent in the particular transaction. Thus, where there were, as matter of fact, but two stockholders having beneficial interests in a corporation, one of whom conducted the financial affairs of the company, having his office in New York, and the other was its general agent at the locality of the business, in Michigan, and the corporation did not hold meetings for a series of years; nor at stated periods elect officers; and these two stockholders conducted the business as though they were partners, the maxim would not apply unless it was made to appear that plaintiff was influenced by these neglects of corporate right and duty, or the absence of formality of proceeding, and where there was no pretense such plaintiff dealt with the parties as partners, but, by notes sued upon, showed he dealt with the corporation. *Id.*

46. **NOTICE OF WANT OF AUTHORITY.** Where the general agent of a corporation makes negotiable paper in the name of his prin-

cipal, a corporate body, payable to himself, he appears to be acting in two capacities, in one of which he stands adversary to his corporate principal. This imposes upon the party discounting, or taking, the paper the obligation of special care in inquiring into his authority to execute the paper. *Id.*

47. **PROMISSORY NOTE TO AGENT.** A promissory note, payable to one named "agent of the Enterprise Insurance Company," executed for the use of the company, in consideration of a policy of insurance issued by it, is properly sued, in Indiana, in the name of the corporation; *Black v. Enterprise Ins. Co.*, **3-294**.

48. **PROMISSORY NOTE.** A complaint upon a promissory note, alleged to have been made to A., and by him assigned, by indorsement, to a plaintiff corporation, is not supported by proof that A. was the agent of the corporation and, as such, took the note in his own name for the plaintiff, upon a consideration moving to the latter; *Smelser v. Wayne & Union Straight Line Turnpike Co.*, **9-238**.

49. **RULE AS TO TORTS.** Strictly speaking, corporations, while acting within the scope of their delegated powers, can not be guilty of wilful fraud; nevertheless, corporations carrying on trade or business, of any kind, are liable for the frauds and wrongs of their agents, perpetrated in the course of their employment, as individual principals would be under like circumstances; *West. R.R. Co. v. Franklin Bank*, **9-411**.

50. **TORTS; PUNITIVE DAMAGES.** While the principal is liable for the torts of his servant or agent in the course of his employment, a railroad company is not liable in punitive damages for the malicious and wanton acts of a conductor, in the absence of proof tending to show either that the company prompted or was privy to it, or approved it afterward; *Turner v. North Beach & Mission R.R. Co.*, **1-202**.

51. **COMMON CARRIER.** A railroad company, acting as a common carrier of passengers, is liable in actual damages for the wrongful act of one of its conductors in refusing to receive a passenger. *Id.*

52. **LIABILITY.** Whether the agents of a corporation have been negligent in performing their duties is a question of fact for a jury; *Weymouth, survivor, v. Penobscot Log Driving Co.*, **7-327**.

53. **PRESIDENT AS.** The president of a corporation, like any other person, may be constituted an agent for the transaction of its business, and his authority to act may be proved by the charter or by-laws, a direct vote of the corporators or board of directors, or by usage acquiesced in by the corporation; *Perry v. Simpson Waterproof Manuf. Co.*, **4-309**.

54. **AUTHORITY OF THE PRESIDENT TO SELL AND ASSIGN SECURITIES.** It can not be objected by a corporation that an assignment of a note by its president was without authority, the proof

showing that by a resolution of the board of directors, adopted prior to the assignment, the president was authorized to pay off any debts owing by the company, in any securities or other property of the corporation, and there being no evidence that it was assigned by him for any other purpose than that expressed in such resolution; *Mitchell v. Deeds*, 1-461.

55. **GENERAL POWERS OF PRESIDENT.** The doctrine seems to be well settled, that the president of a corporate body may perform all acts which are incidental to the execution of the trust reposed in him, such as custom or necessity has imposed upon the office, and this without express authority. And it is immaterial whether such authority exists by virtue of his office or is imposed by the course of the business of the company. *Id.*

56. **APPEARANCE IN SUIT.** The managing agent of a corporation, to have authority to appear for his company in a suit instituted against it, must be one whose powers extend to the whole business of the company and on whom service of summons could be made in accordance with statutory provision; *Lamb v. Gaston & Simpson Gold and Silver Mining Co.*, 8-300.

57. **BINDING ACTS OF.** A director of a corporation retained an attorney and authorized him to employ local counsel to attend to certain suits pending in which the company was interested. The report of the attorney originally retained, of his retainer of the local counsel, to the director, was legal notice to the corporation, and the continued silence of the director amounted, in law, to a ratification by him and, through him, by the corporation of the action of the original attorney in the premises; *Pittsburg, Cin. & St. L. R.R. Co. v. Woolley*, 7-170.

58. **RAILROAD ENGINEER.** An engineer, employed by a railroad corporation, has no authority, by virtue of his position, to bind the corporation, by his contracts. Special authority therefor must be shown; *Gardner v. Boston & M. R.R. Co.*, 7-326.

59. **ASSIGNMENT.** A corporation may make an assignment by an agent; *M'Kiernan v. Lenzen*, 6-264.

60. **CONVEYANCE OF REALTY.** A statute providing that a corporation may convey real estate by an agent appointed by vote for that purpose, does not exclude other modes of conveyance; as by the regular officers of the corporation; *Morris v. Kell*, 5-487.

61. **PURCHASE AND SALE.** Where promoters of a company purchase land and convey it to the corporation formed, at an increased price, pretending to sell at what they paid, and stockholders invest in reliance on the truth of these assertions, they are guilty of fraud, and will not be allowed to hold the profit, even though they acted without precedent authority, if their doings were accepted as agents of the company; *Simmons et al. v. Vulcan Oil, etc., Co.*, 4-80.

62. **TRUSTEESHIP.** An agent or trustee can not, rightfully, place himself in a position of conflict between self-interest and duty.

Generally, such persons may not purchase and make profit from the estate of those toward whom they occupy a confidential relation; *Covington & Lex. R.R. Co. v. Bowler's Heirs*, 4-404.

63. AGENCY TO SUBSCRIBE FOR STOCK. Secretary of an organization, authorized to proceed to an incorporation, may be empowered to subscribe for shares for individuals according to their interests; *Marseilles Land & W. Power Co. v. Aldrich*, 6-406.

64. FORFEITURE OF RIGHTS. Violations of proper instructions given and of charter provisions by a mere agent, the managing officers of the corporation being in ignorance of the wrong done, are not grounds of forfeiture of charter; *Tuscaloosa Sci. & Art Assoc. v. State, ex rel.*, 6-120.

AMOTION.

1. THE POWER AND ITS EXERCISE. The law relating to the power of amotion has been long and well settled. It is a power, judicial in its character, generally exercised by the courts of the land, though it may be given to the corporation, by its charter, and, even if the charter is silent, an officer, or a corporator, in some classes of corporations, may be expelled for sufficient cause. It is essential, in every case, that charges be made, a trial be had, and that the accused be notified and have a full opportunity for defense. The matter must be decided judicially and fairly, and, if against the accused, he, then, may apply to the courts for redress. If it is there found that the corporator or officer had had a fair opportunity for hearing, in his society, and that the charges against him were sufficient and fairly proved, he can have no further relief, but otherwise he will be restored to his rights; *State, ex rel. Pittmann et al. v. Adams et al.*, 3-515.

2. LEGISLATIVE POWER. In a university, a state institution which the state had been in the habit of governing by means of curators appointed by the legislature, for the term of six years from the date of such appointment, "subject to law," it is within the power of such legislature to vacate the office of a curator at discretion, without any fault of his and to vote a new election of a professor to the same chair; *Head v. University*, 5-59.

See DISFRANCHISEMENT OF MEMBER; EXPULSION OF MEMBER.

ARBITRATION.

1. A corporation, which is empowered to sue and be sued, plead and be impleaded, appear in court, defend and prosecute to final judgment and execution, has power to submit a demand made against it, to arbitration, authorized by statute, for the adjustment of controversies; *Morville v. Amer. Tract Soc.*, 7-473.

2. BOARD OF TRADE. If a board of trade can, by articles of association, acquire the power to arbitrate, as a court, the business disputes of its members, still its decisions are subject to be reviewed and examined by the courts. Wherefore, a party

to such proceeding has a right to an appeal, without conditions, to the superior body of the board; *Savannah Cotton Exch. v. State of Ga., ex rel.*, **6-343**.

3. **AGREEMENTS TO ARBITRATE.** Agreements to submit a matter to arbitration are valid when made after the specific controversy has actually arisen, but not when made in advance. The weight of authority is against the power of parties to bind themselves, in advance, that a controversy that may possibly arise shall be conclusively settled by an individual or a corporation; *Bauer v. Samson Lodge*, **10-336**.

4. —. So, where the by-laws of a society provided that a member entitled to benefits, may, if dissatisfied with the decision of the subordinate lodge, appeal, the remedy by appeal is merely cumulative, and does not destroy the right of the member to sue in the courts of the state for the recovery of such benefits. *Id.*

ARTICLES OF ASSOCIATION.

1. **EFFECT OF.** Where corporations are organized under a general incorporation law, their powers and privileges depend on the law and the articles of association framed thereunder; much as they would depend on a charter, if created by special act; *Dewey v. Central Car & Manuf. Co.*, **6-642**.

2. **REQUISITES OF.** The requirements, of a statute, prescribed for the execution of articles of association must be complied with in respect to all substantive statements called for to be made and subscribed; *Richmond Street R.R. Co. v. Reed*, **9-243**.

3. **CERTIFICATE OF INCORPORATION.** The making of the certificate required by the Massachusetts statute in the organization of manufacturing corporations is not a condition precedent to the existence of the corporation under the statute; the failure to make such certificate can not be set up as a defense against a creditor of the corporation; *Merrick v. Reynolds Engine & Governor Co.*, **3-405**.

4. **ACKNOWLEDGMENT OF.** The statute of Maryland provides that "any five or more, free white persons, who may desire to form a company for the purpose of carrying on any manufacturing business, may make, sign and acknowledge . . . a certificate in writing," etc. It was objected to the certificate of the Antietam Manufacturing Company of Washington county, that it did not appear upon its face to have been acknowledged by all of the subscribers. Held, that the statute does not require the acknowledgment of more than five persons; such acknowledgment, therefore, by all the subscribers is not a condition precedent, nor can the refusal of one, or more, deprive those who do join in the acknowledgment, from claiming the right of incorporation, provided they be five, or more, in number; *Hughes v. Antietam Manuf. Co. of Washington county*, **3-377**.

5. **USE OF WORDS.** Where, in preparing a certificate of incor-

poration, the incorporators employ only the words used in the statute to describe the general purposes of such incorporation, it will be presumed that they intended to create a corporation of the same general nature and with the same general powers granted by the statute; rather than that, by such words, they sought to apply special limitations on the powers of the corporation; *Whetstone v. Ottawa University*, 7-116.

6. CERTAINTY OF DESCRIPTION. Articles of association of a road corporation describe the termini of the projected road, with sufficient certainty, when the description can be rendered certain; as where the road is made to start at a point definitely described, to run specified courses and distances to an end, the whole length of road being given; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

7. PAPERS ATTACHED. A paper referred to in the articles, as an exhibit, and as a part of such articles and recorded with them, becomes a part of the articles as effectually as if it had been contained in the body of them. *Id.*

8. ATTESTATION OF. The authority of the officer to certify to the formality of articles of association, or incorporation, is a question of jurisdiction; and, as such, is a proper subject of inquiry when the legal existence of the corporation is in issue. The court of appeals of Maryland must be understood as expressing no opinion as to "whether the mere form of proceedings, taken to create a corporation, is open" after certificate duly made that they are formal; *Oler v. Baltimore & R. R.R.*, for use etc., 7-349.

9. MISNOMER. If there is enough in the expressions used in a subscription to stock, under articles of association, or incorporation, to describe the corporation intended, it will effectuate the contract of subscription. *Id.*

10. INSUFFICIENT. A law required (California) the articles of incorporation, among other things, to set forth that a majority of the members of such association voted at such election, etc., upon the recital of the election, that is, of directors; if the averment of such vote by a majority of the members be omitted, the certificate will not constitute the association a corporate body; *People, ex rel. v. Segbridge et al.*, 6-242.

11. DOUBTFUL VALIDITY. It is questionable (but not in this case meant to be decided) whether an incorporation is binding and of force, in the event that the principal part of the agreement of association is not sustainable in law; *People, ex rel. Stewart, v. Young Men's Father Matthew Total Abstinence Society*, 6-526.

12. EFFECT OF SIGNING. One who signs an instrument plainly intended to be final articles of association for the organization of a corporation — in this case, a street railway company — though defective in form, but which, by one article, gives power to any two subscribers to call a meeting "for the purpose of effecting an organization and incorporation under the laws" of the state, and electing directors and authorizing any three subscribers, at such

meeting, "to have said company duly organized and incorporated as herein provided," does not empower such meeting to make new and perfect articles of association and bind him thereby; *Richmond Street Ry. Co. v. Reed*, 9-243.

13. SIGNATURE BY INITIALS. Under a statute which requires the names and places of residence of the subscribers shall be subscribed to said articles the law intends they may be subscribed by the incorporators, by their usual signatures, and the use of initials to designate their given names is not objectionable; *State, ex rel. Collings, prosecuting attorney, v. Beck et al.*, 9-227.

14. ARTICLES AS A CONTRACT. A corporation is bound to perform the duties prescribed by its certificate of incorporation and a trust deed made thereunder. For any neglect or failure properly to discharge its duty in this respect, it will be liable to a stockholder who is injured thereby; *O'Connor v. North Tuckee Ditch Co.*, 9-542.

15. COMMENCING BUSINESS UNDER. The general incorporation law of Iowa requires the filing of the copy of notice of incorporation in the office of the secretary of state, within three months of their publication in the county wherein is located the company's principal office. The court follows *First National Bank v. Davies, Amer. Corp. Cas.*, 6-517, in which case, a majority of the members of the court held the omission so to file did not invalidate transactions of the company, nor render stockholders liable as partners; *Eisfield v. Kenworth et al.*, 6-546.

16. —. By the law of Iowa (revision, § 1152, as amended by chapter 172 of 1870) a corporation organizing is not a valid corporation for the prosecution of its business, unless it shall file a copy of its articles of incorporation in the office of the secretary of state within three months of the date at which the same were filed in the office of the recorder of deeds in the county in which its principal office is located; *First Nat. Bk. of Davenport v. Davies*, 6-517.

17. —. On rehearing allowed, three judges, a majority of the court, held that the filing of articles of incorporation in the office of secretary of state is not essential to the validity of the corporation. *Id.*

18. EVIDENCE OF SUM SUBSCRIBED. The articles of association, certified by the secretary of state, afford prima facie evidence that the full amount of capital stock required to be subscribed before there is a lawful organization, has been subscribed. In the absence of evidence to the contrary such articles are conclusive; *Jewell et al. v. Rock R. Paper Co. et al.*, 9-71.

19. TERM OF EXISTENCE. The statute under which a corporation was organized provided that the certificate of incorporation should state "the term of its existence, not to exceed forty years." The incorporators used the words, "the term of existence of said company or corporation not to exceed the term of forty years."

Held, this was sufficiently definite. It means and is to be understood as creating a term for at least forty years; *Merrick v. Reynolds Eng. & G. Co.*, **3-405**.

20. **IMMATERIAL ERROR.** The statute required articles of association to set forth, among other things, "the amount of the capital stock," and "the number of shares of which said stock shall consist." Articles were subscribed reading thus, "have fixed the capital stock of said company at \$150,000, said capital stock shall consist of 500 shares, at \$100 per share," etc. It was objected that this did not state the number of shares with sufficient precision and accuracy. Held, this is a mistake apparent on the face of the certificate itself; the insertion of 500 instead of 1,500 shares is an error which could not deceive or injure any one. *Id.*

21. **INVALID ACTS UNDER.** A by-law of a corporation can not be valid which seeks to impose restrictions on membership, which are not to be found in, or are in conflict with, the articles of association. A by-law can not narrow the plain meaning of such articles; *People, ex rel., v. Young Men's etc. Benevolent Soc.*, **6-626**.

22. **UNLAWFUL RESTRICTIONS UNDER.** Where articles of association prescribe qualifications for, and conditions of, membership no additional, or other, restriction on such membership can be imposed by by-law, unless the articles be themselves amended to admit it. *Id.*

23. **COPY OF ARTICLES AS EVIDENCE.** When it is shown that the original articles of a corporation are lost, the record of the copy, filed in the recorder's office, is admissible in evidence; *Washer v. Allensville etc. Turnpike Co.*, **9-223**.

24. **PLEADING NOT AID DEFECTS.** If articles of association be defective, in not setting forth a material fact, required by law to be set forth, they will not be aided by an answer on quo warranto, nor can proof be admitted to establish the fact; *People, ex rel., v. Seybridge et al.*, **6-242**.

See **CHARTER; ORGANIZATION.**

ASSESSMENT.

1. **ITS NATURE.** An assessment of benefits is an exercise of the taxing power, and, in a general sense, a tax, but it is a tax of a peculiar nature. It is a local assessment imposed occasionally, as required, upon a limited class of persons interested in a local improvement, who are assumed to be benefited by the improvement, to the extent of the assessment, and it is imposed and collected as an equivalent for that benefit and to pay for the improvement; *City of Bridgeport v. New York etc. R.R. Co.*, **3-189**.

2. **ASSESSMENTS ARE NOT TAXES.** Assessments made for local improvements are not taxes levied, within the meaning of the constitution of Louisiana, and are not controlled by that pro-

vision which requires that all taxes shall be uniform; City of New Orleans, praying for the opening of Casacalvo and Moreau streets, 2-375.

3. UPON WHAT PROPERTY TO BE MADE. Property lying in the neighborhood of an improvement, whether taken or not, is liable to be assessed for the proportion of benefit derived from such improvements. *Id.*

4. —. To authorize an assessment of a tax for an improvement, it must be shown that the property assessed was benefited by the improvement. *Id.*

5. UNIFORMITY OF ASSESSMENT. A rate of assessment which is uniform and equal throughout the district in which it is imposed, is consistent with the constitutional provision, of Indiana, requiring the legislature "to prescribe such regulations as shall seem a just valuation for taxation of all property, both real and personal"; *Palmer v. Stumph*, 2-216.

6. RIGHT OF WAY. That the company has not procured the right of way for the location and construction of its drain is no defense to an action to recover assessments; *Large v. Keen's Creek Draining Co.*, 1-358.

7. ASSESSMENT OF BENEFITS. The value of land benefited should be considered in assessing against the owner the expenses of making a sewer. An arbitrary rule, to apportion the expense against owners by the front feet of their lots, is unreasonable; *Clapp v. City of Hartford*, 2-107.

8. AFFIDAVIT OF APPRAISERS. An affidavit of appraisal showing that "the foregoing appraisal is correct to the best of our judgment" is sufficient under section 12 of the statute, which requires an affidavit showing "that the same is in all respects a true assessment to the best of their judgment and belief;" *Large v. Keen's Creek Draining Co.*, 1-358.

9. — OBJECTION: WHEN TAKEN. An objection to an assessment, upon the ground that it was levied upon the front foot, and not upon the property specially benefited, should be taken before the council; *Jenks et al. v. City of Chicago*, 2-183.

10. RIGHT TO OBJECT TO FINDING OF APPRAISER. The act providing for the assessment of the expenses of opening streets in the city of New Orleans confers upon "any person whose interest may be affected," the right to make objections to the report, estimate and assessment. Held, that the term "person" included the city, and that it was not precluded from objecting to an assessment; City of New Orleans, praying for the opening of Casacalvo and Moreau streets, 2-375.

11. NOTICE; TIME OF PUBLICATION. When the record of proceedings for a judgment upon a special assessment warrant shows that the notice given by the collector, upon receipt of the warrant, was published ten days consecutively, and it is not made to appear that the paper in which the notice was published was pub-

lished on Sunday, it will be presumed that the ten days were ten consecutive secular days; *Jenks et al. v. City of Chicago*, 2-183.

12. **MODE OF AUTHENTICATION.** An assessment made by the superintendent of public streets in San Francisco, to cover a sum due for the improvement of a street, is an official act, and must be authenticated by his official signature. An assessment not thus officially attested, though attached to the diagram and the superintendent's warrant, which were in due form properly attested, does not constitute a valid assessment, and is not admissible in evidence, either by itself, or in connection with the warrant and diagram; *Dougherty v. Hitchcock*, 2-179.

13. **REPORT OF THE BOARD OF PUBLIC WORKS CAN NOT BE IMPEACHED.** The report of the board of public works in the city of Chicago, showing that lots against which they have made an assessment for a public improvement will be specially benefited thereby, can be impeached only for fraud; *Elliott v. City of Chicago*, 2-181.

14. **ALTERATION OF ROLL.** An assessor in the state of Nevada is not authorized to alter an assessment roll, after its delivery for collection; *State of Nevada v. Manhattan Silv. Min. Co.*, 2-607.

15. **FINDING OF COMMISSIONERS.** The determination of the commissioners as to what property shall be assessed is conclusive, unless impeached for fraud; and, in an application for judgment on such an assessment, it is not competent to prove that lots have been omitted from the assessment, though benefited by the proposed improvement as much as those included therein; *Wright v. City of Chicago*, 2-176.

16. — **CAN NOT BE IMPEACHED.** When it appears that an assessment in the city of Chicago, for a proposed improvement, was upon property specially benefited, in the judgment of the commissioners making the assessment, their judgment can not be impeached, except for fraud; *Jenks et al. v. City of Chicago*, 2-183.

17. **CONCLUSIVENESS OF FINDING.** After final ratification and return of commissioners appointed to lay out and condemn a public road, their proceedings can be in no wise collaterally impeached; *Tyson v. Com'rs of Balt. Co.*, 2-391.

18. **EVIDENCE.** Commissioners in making such an assessment act in a quasi judicial capacity, and they can not be required, in any tribunal, to give reasons for their action; *Wright v. City of Chicago*, 2-176.

19. **BEFORE COMPLETED ORGANIZATION.** Procuring an assessment to be made upon lands to aid in the construction of a drain by a draining association, organized under the statute of the state of Indiana, is a corporate act, and can not be legally done until after the articles of association have been legally recorded; *New Eel River Draining Association v. Caniger*, 1-357; *Same v. Durbin*, 1-353.

20. **ACTION ON ASSESSMENT.** In a suit by such an association upon an assessment, the defendant, if not a member of the association and if he has not contracted with it as a corporation, may plead nul tiel corporation at the date of the assessment. *Id.*

21. **EXCESSIVE ASSESSMENT.** The fact that an assessment made by such an association, otherwise valid, is too high, will not defeat an action thereon, but will go to reduce the amount of the recovery. *Id.*

22. **INTEREST ON ILLEGAL ASSESSMENT.** It is error in rendering judgment upon a new assessment which is sustained upon the ground that a former assessment was invalid, to include in such judgment the costs of the original assessment, with interest from the date of its confirmation; *Lafin et al. v. City of Chicago*, 2-199.

23. **CONTRACT UNDER ASSESSMENT.** A valid assessment must be founded on a contract duly authorized and executed as required by statute; *Dougherty v. Hitchcock*, 2-79.

24. **WHEN INVALID.** An order of a board of commissioners, appointing assessors to make an assessment under the statute of Indiana, of March 11, 1867, for a gravel road company not legally incorporated, is void; *Piper et al. v. Rhodes et al.*, 1-360.

25. **VOID ASSESSMENT.** In the estimate of damages and benefits, for the laying out and opening a public highway along side of and parallel with a railroad, the franchise of the railroad company is not properly the subject of assessment; wherefore, an assessment laid upon such corporate franchise on the ground that it will be benefited and its value increased, because by the permanent removal and prevention of obstructions to vision the lines of sight on the road will be extended and the company be, thereby, enabled to run its trains at greater speed, with less liability to casualties or to possible future expense of maintaining gates, or flagmen, at crossings, was held to be void; *City of Bridgeport v. N. Y. etc. R.R. Co.*, 3-189.

26. — **DOES NOT EXHAUST POWER.** An attempt to make an assessment does not exhaust the power of the superintendent, when such assessment is void; *Himmelman v. Cofran*, 2-104.

27. **CHARTER CONSTRUED.** The charter of the city of Chicago authorized a new assessment for the purpose of opening a street, when "from any cause the city fails to collect the whole or any portion of any special assessment." This was held to apply to new assessments made necessary by the illegality of the original assessment; *Lafin et al. v. City of Chicago*, 2-199.

28. **"INVESTIGATION;" STATUTE CONSTRUED.** An investigation of the facts upon which an assessment is made, for the purpose of opening a street in the city of Chicago, does not necessarily involve an examination of the premises; *Wright v. City of Chicago*, 2-176.

29. **SAN FRANCISCO; STREETS; MANDATE.** The contractor who

has completed work on the streets of San Francisco, under a valid contract, is entitled to an assessment on the lots fronting on the street improved, to pay for such improvement; and upon a proper showing the courts will, by mandate, compel the superintendent of streets to make such assessment; *Himmelman v. Cofran*, **2-104**.

30. PRESUMPTION. When a report of commissioners, in respect to an assessment of special benefits to be derived from public improvements, shows that they found and estimated the benefits to private property, relating to that of the whole city, and assessed the private property accordingly, it will be presumed that they thoroughly investigated the subject, though it is not so expressly stated; *Wright v. City of Chicago*, **2-176**.

31. PAYMENT; CANCELLATION; DISCHARGE. The municipal authorities levied an assessment upon a lot, for the construction of a drain from it to the main sewer, the owner having been required to construct the same, and having failed to comply with the requirement. After the levy was made the owner sold the lot, and after the sale, his agent, having no knowledge of the sale, paid the assessment and took a receipt therefor. The collector marked the assessment upon his books as paid, but afterward, upon the claim of the agent that the payment was made by mistake, refunded the money, destroyed the receipt and canceled the entries of payment on the books. Held, 1. That this operated as a payment and discharge of the assessment; but, 2. That if money received in payment of an assessment on one lot was entered by mistake to the credit of another, the mistake could be corrected by the collector; *Mason v. City of Chicago*, **2-194**.

32. CONTRACTOR'S RECOURSE. Contract to perform work on streets, expressly stipulating, on the part of the contractor, that he will look for payment only to the proceeds of special assessments already levied, or to be levied, making no claim against the corporation, except as upon the collection of such assessments. Mandamus will not issue to compel the city to some other mode of payment, it appearing that the corporation is in good faith and with reasonable diligence, collecting by means of such assessments; *City of Chicago v. People*, ex rel., **2-192**.

ASSESSMENT OF STOCK.

1. LIABILITY ON STOCK. The original holder of stock is liable for unpaid assessments thereon, without any express promise to pay. Any contract in limitation of his liability is void; *Upton etc. v. Tribilecock*, and *Webster v. Upton etc.*, **5-111, 120**.

2. ASSESSMENTS, OR CALLS. The general rule is, that where the capital stock and the number of shares are fixed, in the articles of association or recorded certificate, no valid assessments or calls can be made against a subscriber until all the shares are taken, unless there be a provision to that effect, either in the certificate or gen-

eral law under which the company is organized; *Hughes v. Antietam Manuf. Co. of Washington Co.*, 3-377.

3. PREREQUISITE. Where the charter of a corporation provides for, or authorizes, a stipulated amount of capital stock, divided into shares of a specific number, or value, no assessment can be made against the subscribers until the whole amount has been subscribed, unless a contrary intention is manifested in the charter or in the subscription; *Selma, Marion & Memphis R.R. Co. v. Anderson*, 8-27.

4. CONSOLIDATED COMPANY. A corporation, formed by the consolidation of two, or more, companies, can not make valid assessments on subscriptions to the stock of one of its constituent companies, before corporate existence has been completed, by compliance with all statutory requirements; *Peninsular Ry. Co. v. Tharp*, 5-465.

5. —. It is essential, in such case, in an action upon assessments to the capital stock of a constituent company, on a ground of right by succession under the statute, that there be shown a consolidation strictly conforming to the statute authorizing it; *Mansfield etc. R.R. Co. v. Drinker*, 5-466.

6. CONDITION PRECEDENT. Contract of subscription containing a condition precedent — in this case that a certain amount of stock should be subscribed for — plaintiff must aver and prove performance or a waiver to fix a liability on defendant; *Livesey v. Omaha Hotel Co.*, 8-312.

7. ASSESSMENT AS PRECEDENT TO ACTION. Agreement to take stock and pay all charges and assessments regularly levied or assessed by directors. Recovery only after assessment or call; *Grosse I. Hotel Co. v. Exec'rs etc.* 8-407; *S. E., Santa Cruz R.R. Co. v. Schwartz*, 6-243.

8. PREREQUISITE OF. Before an assessment can be legally made, the number of shares or the amount of capital stock must be definitely fixed; *Somerset R.R. Co. v. Clarke*, 4-428.

9. —. It is indispensable that the number of shares should be determined before an assessment on the shares can be made. If the number be not fixed by the charter, it is to be presumed that it should be by the directors or stockholders. *Id.*

10. —. When an act of incorporation fixes the amount of capital stock which a corporation may hold, the corporation can not make an assessment upon the shares of a stockholder, until all the capital stock has been subscribed, unless, either expressly or by implication, a different intent appears in the charter, or in the contract of subscription; *Peoria & Rock Island R.R. Co. v. Preston*, 4-389.

11. —. When the subscription contract, or charter, of a corporation specifically fixes the amount of the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against

a subscriber to recover assessments levied on the shares of stock, in the absence of a clear provision in the contract authorizing the corporation to proceed, with the accomplishment of the main design, with a less subscription than the whole amount of capital specified, or unless there is a waiver of the condition precedent; *Livesey v. Omaha Hotel Co.*, 8-312.

12. **CONDITION PRECEDENT.** Where the amount of the capital stock of a corporation, and the number of shares into which it shall be divided, are fixed by articles of incorporation, it is necessary that the whole capital stock shall be subscribed before an assessment can be made; *Baile v. Calvert College Educational Soc.*, 7-379.

13. —. A general incorporation act provided that the directors of corporations formed under it might call in all sums of money subscribed at such times and in such payments and instalments as they might deem proper, under penalty of forfeiting the shares subscribed for and payments previously made, if payment be not made, within a number of days fixed, after personal demand or publication in a manner prescribed. Demand or notice, as prescribed, is a condition precedent to the right to sue for calls or assessments upon the stock subscribed; *Granite Roofing Co. v. Michael*, 7-407.

14. **CONDITIONAL SUBSCRIPTION.** The charter of a corporation authorizing subscribers to its capital stock to designate upon what part of the company's work the amount of their subscriptions shall be expended, a general creditor can not, by trustee process, collect an assessment made upon a subscriber, and divert and hold the proceeds of such assessment for a debt not contracted within the purpose designated in the subscription; *Pike v. Bangor & C. S. L. R.R. Co. et al.*, 7-323.

15. **CAPITAL MUST BE FIXED.** Where by charter the capital stock might consist of not less than a given number of shares, which number might be, from time to time, increased, an assessment before the capital stock was fixed was invalid. *Id.*

16. **EQUALITY OF.** An assessment must be upon all shares of stock held in like manner; wherefore an assessment made on the stock held by towns and cities and omitting the shares held by individuals, is invalid. *Id.*

17. **PRIOR TO SUBSCRIPTION.** An assessment upon stock of a corporation subscribed for, made before the date of subscription for the stock, creates no liability against the subscriber. *Id.*

18. **MADE BY COMMITTEE.** The appointment by a board of directors of a committee to make an assessment is in excess of the directors' authority, and, unless ratified by act of the directors, an assessment so made is void. *Id.*

19. **BY OVERPLUS OF DIRECTORS.** An assessment of stock made by a greater number of directors than the charter has authorized to be elected is invalid. A subscriber who has acquiesced in the

illegal action of such an unlawful board can not, however, set it up as a defense when called upon to pay the assessment; *Macon & Augusta Ry. Co. v. Vason et al.*, 7-4.

20. COMPUTATION OF SUBSCRIPTION. Where the subscription list shows upon its face that the capital stock of a corporation has been taken, and, when the subscriptions have been, in good faith, accepted by the company, and when, upon the faith of such subscriptions, property is acquired and liabilities are incurred, a subscriber to the stock can not rely upon the fact, subsequently appearing, that some of the subscriptions were improperly made and without authority, as a defense to an action against him to recover an assessment levied on shares of the stock held by him; *Baile v. Calvert College Educat'l Soc.*, 7-379.

21. NOTICE. Publication of notice, by statute, required during sixty days, is not good, the publication being only during fifty-nine days; *Macon & Augusta Ry. Co. v. Vason et al.*, 7-4.

22. NOTICE OF. The president of the board of trustees called upon a stockholder and made demand, in person, that he pay an assessment levied upon his stock, at the time, stating that he did so at the request and by the authority of the trustees. Sufficient notice of assessment, or call; *Baile v. Calvert College Educat'l Soc.*, 7-379.

23. WAIVER OF CONDITION PRECEDENT. When articles of incorporation are adopted and properly filed, as required by law, in the absence of any prohibition by such articles or by-law, the parties to the undertaking may employ agents to secure the full amount of capital required, to procure information in regard to the enterprise, and may contribute money to pay expenses incurred in all necessary preliminary steps in perfecting the organization of the company. Participation in such and similar acts will not be the basis of a presumption that any subscriber waived a precedent condition that the whole amount of capital stock required should be subscribed before the company proceeds to the accomplishment of the main design of its incorporation; *Livesey v. Omaha Hotel Co.*, 8-312.

24. EFFECT OF PAYMENT. Payment of calls on shares subscribed will estop, an original subscriber for shares, from denying his liability for future calls; *Hamilton et al. v. Grangers Life & Health Ins. Co.*, 9-55.

25. ESTOPPEL BY PARTICIPATION. One who participates in all the proceedings, in forming a corporation and making calls for the subscriptions, both as stockholder and director, is estopped to deny the validity of such proceedings in a suit to compel the payment of calls on the stock he subscribed for; *Kansas City Hotel Co. v. Harris*, 8-89; *S. E. Ossipee Hosiery etc. Co. v. Canney*, 5-532.

26. CHARTER RIGHT CONSTRUED. Where the charter of a railroad company provided that upon stock to the amount of

\$100,000, or ten per cent. of the whole capital stock being subscribed for, an organization of the corporation should be perfected by the election and appointment of proper officers, and the directors elected should then re-open the books, and continue the receipt of subscriptions until the whole amount of the capital stock should be subscribed, and that "all subscriptions to the stock of said company shall be paid, at such times, in such amounts, and on such conditions as said directors may prescribe," it was held that the latter provision, respecting the times and terms of payment, had reference to the time when the full amount of stock is taken, and no authority is conferred by it to assess until all the stock is subscribed for; *Peoria & R. Isl. R.R. Co. v. Preston*, 4-389.

27. IN OREGON. The general incorporation act in Oregon does not require subscription to the entire amount of the capital stock of a corporation as a condition precedent to legal existence; therefore, whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its board of directors, the power to levy assessments. Generally, whenever a sufficient amount of the capital stock of a private corporation has been subscribed to authorize the stockholders to proceed to the election of directors, and such directors have been properly elected, assessments can be lawfully made upon the unpaid stock subscribed for; *Willamette Freighting Co. v. Stannus*, 4-64.

28. AFTER CAPITAL INCREASED. In Oregon, notwithstanding the entire amount of the capital stock has not been subscribed for, the directors may increase the amount of such capital stock. If such increase be made, still, although the original stock be not yet taken, the directors may levy assessments on the unpaid stock subscribed for. This rule, however, would not apply where subscription to the entire capital stock, as fixed or to be determined by the board of directors, is made a condition precedent to the exercise of the power of levying stock. *Id.*

29. REMEDY FOR DEFAULT IN PAYMENT. The act of becoming a stockholder in a corporation, by subscribing articles of association, is one from which the law raises a promise to pay the instalments legally assessed and demandable. The common law furnishes a remedy for a violation of this engagement by an action of assumpsit. The subsequent enactment authorizing forfeiture and sale of the stock is cumulative as a remedy; *Hughes v. Antietam Manuf. Co.*, 3-377.

30. FORFEITURE AND SALE, CUMULATIVE REMEDY. A corporation may maintain an action upon an express promise to pay assessments on stock, although, by a subsequent provision of the subscription paper, it is authorized, in case of non payment, to sell the stock; *Boston, Barre & Gardner R.R. Co. v. Wellington*, 5-442.

31. POWER TO ASSESS BEFORE STOCK SUBSCRIBED. By the charter, in this case, the corporation was empowered to receive sub-

scriptions and lay assessments and sue for their recovery before the stock was fully subscribed. *Id.*

32. **SALE FOR NON PAYMENT.** After a sale of shares of stock in a corporation, under a statute providing that "if the proprietor of any share or shares shall refuse or neglect to pay any tax or assessment duly voted" etc., "the treasurer may sell, by public auction, the share or shares of such delinquent proprietor, sufficient to pay all taxes and assessments which may be then due from said proprietor, with all necessary and incidental charges," no action can be maintained against the stockholder for a balance due thereon; *Mechanics' Foundry etc. Co. v. Hall*, 7-458.

33. **ASSESSMENT OF STOCK BEFORE ORGANIZATION.** Where the owners of undivided interests in real property enter into an agreement, in writing, to form, immediately, a special partnership, to improve and develop the property, until a corporation can be lawfully organized, each party agreeing to furnish his proportion of the fund necessary for the immediate improvement thereof and to receive stock proportioned to his payments, the owner of such interest will, in equity, be held, both before and after the organization of the corporate body, liable to reasonable assessments for the attainment of the contemplated purposes; *Marseilles Land & Water Power Co. v. Aldrich*, 6-406.

34. **ERROR IN.** When the court, upon application by the receiver, made an order prescribing the per centage of assessment to be made against makers of premium notes of an insurance company, the policy holders are bound by such adjudication, and a supposed error in making such assessment can not be availed of by a member of the corporation; *Lycoming Fire Ins. Co. v. Langley*, 10-542.

35. **LIMITATIONS.** A subscription being in writing, an action to recover an assessment thereon is not, in Ohio, barred until fifteen years expired; *Gibson v. Columbia & N. R. T. & B. Co.*, 3-665.

36. **ENFORCEMENT OF.** A subscriber for shares in the capital stock of a corporation refused to pay the assessments on the shares. The company did not formally declare such shares forfeited, but procured subscriptions from other persons to the full amount of the capital stock as fixed by the directors. It was held, that the company could not thus sell the shares and sue the subscriber for the difference between the assessment and the sum for which the shares were sold, under a statute which provides: (1) The shares may be sold, and any deficiency collected by an action; (2) The shares may be declared forfeited, and may be transferred to any responsible person who will subscribe for the same; *Athol & Enfield R.R. Co. v. Inhabitants of Prescott*, 4-448.

37. **COLLECTION OF, AFTER BUSINESS DISCONTINUED.** The adoption, by a corporation, of a resolution to discontinue its business

does not operate to work a dissolution of the company ; nor does it deprive the corporation of the power to enforce assessments on stock owned, by action ; *Choteau Ins. Co. v. Floyd*, 8-283.

38. REQUIREMENTS IN ACTION FOR. In an action brought to recover an unpaid balance of assessments due upon shares of stock after sale of the shares, made for non compliance with calls, the plaintiff must prove legal assessments upon the shares of defendant and a legal sale, before defendant can be held accountable for such balance ; *Somerset R.R. Co. v. Clarke*, 4-428.

39. INVALID. An association of one state, organized under its laws, can not compel its members to pay an assessment levied by another corporate body which is beyond the jurisdiction of the law of the state which created the first mentioned corporation. As it may not compel the payment of such assessment it can not suspend a member for non payment thereof ; *Lamphere v. Grand Lodge A. O. U. W.*, 7-594.

40. DEFENSE ; MISAPPROPRIATION OF FUNDS. That funds of a corporation, sufficient to pay its debts, have been misappropriated by an agent is not a sufficient defense against an assessment made for the payment of debts ; *Sullivan v. Triunfo Gold and Silver Mining Co.*, 3-132.

41. ACTION ON STOCK HELD BY CITY. Where an invalid assessment is levied on stock owned by a city, subscribed for in a corporation, a vote of common council, authorizing its payment, will not preclude the city from setting up any legal defense in bar of recovery ; *Pike v. Bangor & C. S. L. R.R. Co. et al.*, 7-323.

42. INSOLVENCY ; DEFENSE. In action by an insolvent corporation, to collect an assessment on stock, no defense will be admitted grounded on defects of organization, unless such defects might be successfully set up in answer to a creditor's bill filed against the stockholder to enforce his personal liability ; *Ossipee Hosiery etc. Co. v. Canney*, 5-532.

43. COMPROMISE OF COMPANY DEBTS. A stockholder can not defeat an assessment by showing that the directors have compromised and paid all the debts of the corporation with their own money. If they paid them at a discount the corporation is entitled, against such directors, to any profit resulting from such transaction ; *Choteau Ins. Co. v. Floyd*, 8-283.

44. NECESSITY OF, AS A DEFENSE AGAINST. When a stockholder of a corporation is sued for the amount of an assessment upon his subscription for stock, he will not be allowed to dispute the necessity of the assessment. *Id.*

45. UNWARRANTED SALE UPON. Plaintiff's testator, Mitchell, was a stockholder in a Vermont mining corporation. The directors of the company imposed an assessment upon its stock and advertised the stock of Mitchell for sale for non payment thereof. Prior to the sale Mitchell tendered to the president of the corporation, at its office, during business hours, his check for the

amount of the assessment. The president refused to accept, but made no objection as to form or amount. The stock was sold and bought in by the president. Mitchell repeatedly thereafter offered to the corporation and to its president the amount of the assessment and all charges and expenses in making the sale. In an action brought to set aside the sale and to restrain a transfer of the stock to the purchaser, the court of appeals of New York held that in the absence of evidence of want of authority in the president, the tender must be assumed to have been properly made to him; that the question of want of authority not having been raised upon the trial, could not be raised upon appeal; that no objections as to the form or amount of the tender having been made at the time they were waived the tender must be held sufficient; that a sufficient tender having been made, the sale was without authority and void, and that plaintiff was entitled to the equitable relief claimed; *Mitchell, executrix etc., et al. v. Vt. Copper Min. Co. et al.*, 8-473.

ASSETS.

1. **TRUST FUND.** In equity the property of a corporation is regarded as held in trust for the payment of its debts. Creditors may pursue it in to the hands of all persons, except only those of bona fide purchasers; *Chic., R. I. & P. R.R. Co. v. Howard et al.*, 1-1.

2. —. The assets of an incorporated company are a trust fund, for the payment of its debts; which may be followed in to the hand of any person having notice of the trust; *Jones, M'Dowell & Co. et al. v. Ark. M. & A. Co.*, 6-213; *Bartlett v. Drew*, 4-634.

3. —. In equity the corporation is regarded as a trustee, holding the corporate property for the benefit of its creditors and shareholders, which, upon its dissolution or civil death, a court of chancery will lay hold of for a trust fund and distribute for their benefit; *St. L. & Sandoval Coal Co. v. Sandoval Coal Co.*, 10-292.

4. —. The property and assets of a corporation are vested in the trustees, to be preserved by them, as a fund to secure the creditors of the corporation; *San Francisco & North Pacific R.R. Co. v. Bee et al.*, 5-147.

5. **CREDITOR'S RIGHTS.** It is not competent, to the members of a corporation, to dissipate its property and assets so as to place any portion thereof beyond the reach of the creditors of the corporation, and a re-incorporation under or by a new corporate name and the transfer of the assets of the old incorporation to the new one, will not be effectual to bar the rights of creditors, who may follow the property in possession of the new company. *Id.*

6. **PURCHASE OF, BY DIRECTOR.** The purchase of the assets of a corporation, which is insolvent, by a director thereof, is not void,

but only voidable at the instance of a party in interest; *Jones etc. Co. et al. v. Ark. M. & A. Co.*, 6-213.

7. **PURCHASE OF, BY DIRECTOR.** When the property and franchises of an insolvent corporation are sold for a certain consideration, and mortgagors and bondholders, who had a lien on the property sold, arranged with stockholders and the corporation and effected the sale thereunder, agreeing that a per centage of the proceeds shall be paid to the bondholders in full satisfaction of their bonds, and the remainder shall be distributed to the stockholders, the portion set apart for the stockholders is a fund belonging to the corporation, discharged of the lien of the mortgage, and subject, as other assets, to the debts of the corporation; *Chic., R. I. & P. R.R. Co. v. Howard*, 1-1.

8. **LEGISLATIVE POWER.** It is a proper exercise of the police power of the state, that the legislature shall prescribe what amount of assets an incorporated company shall possess, or on what basis its solvency shall be estimated; *Chic. L. Ins. Co. v. Auditor etc.*, 9-79.

9. —. A transfer of corporate property may be well worked by legislative enactment, accepted, sanctioned and given effect to by the parties between whom the transfer is made; *Miller v. Lancaster*, 4-170.

10. **WHAT ARE NOT ACCOUNTED.** Securities which stand in the name of a corporation and to which apparently the company has title, but for which the company has paid nothing and which are, in fact, not its property; but which they have taken in the name of the company, expecting in the future to acquire property therein, are not bona fide assets of such corporation; *Chic. L. Ins. Co. v. Auditor etc.*, 9-79.

11. —. The good will of a corporation, be its value what it may, is not to be accounted as an asset of such company. *Id.*

12. **UNPAID STOCK.** Unpaid balances of stock subscriptions are corporate assets; *Shockley v. Fisher*, 9-520; *Lane v. Nickerson*, 6-513.

See CORPORATE FUNDS.

ASSIGNMENT.

1. **CORPORATION MAY ASSIGN.** An existing corporation may make a valid assignment of its assets for the benefit of creditors; *M'Callie & Jones v. Walton*, assignee, 1-314.

2. —. An assignment by a corporation of all its property for the benefit of all its creditors, with the usual directions as to the performance of the trust, is not obnoxious to the statutes of 13 and 27 Elizabeth. *Id.*

3. **FOR BENEFIT OF CREDITORS.** A corporation may make an assignment for the benefit of creditors, under the statute of Missouri; *Shockley v. Fisher*, 9-520.

4. **POWER TO MAKE.** Where the affairs of a corporation are

intrusted to a general managing agent, he may assign the choses in action of the corporation to its creditors, either in payment of or to secure a precedent debt of the corporation, without express authority from the board of directors. An assignment so made is valid; *M'Kiernan v. Lenzen*, 6-264.

5. POWER TO MAKE. It is well settled that, in the absence of any restriction, by charter or general law, a corporation may execute an assignment of its property for the benefit of its creditors. Such an assignment may be made by the corporate directors, without express authority, or consent of the stockholders; *DeCamp et al. v. Alward*, 7-76.

6. EFFECT OF GENERAL ASSIGNMENT. The act of a corporation in assigning its property, for the payment of the debts of the corporation and to distribute the surplus, if any, does not work a dissolution of the company. *Id.*

7. JUDGMENT. A judgment obtained subsequently to such an assignment takes no priority in the distribution of the assets; *M'Callie et al. v. Walton*, assignee, 1-314.

8. TRUSTEE. If one of two persons to whom an assignment for the benefit of creditors is made refuses to qualify, all the powers of the trust vest in the other and he may proceed alone to collect the assets; *Shockley v. Fisher*, 9-520.

9. ASSIGNMENT OF STOCK DUES. Where the amount due on a stock subscription has been regularly called in, by assessment, and stands as a liquidated demand, on which suit will lie, it would seem that the claim may be assigned as well before as after judgment. Such assignment, however, will be subject to equities and will not deprive the debtor of any rights of a stockholder; *Wells et al. v. Rogers*, 9-487.

10. UNPAID STOCK. Unpaid balances upon stock subscriptions are corporate assets and are assignable. Being properly assigned they pass to the assignee. He may collect them; *Shockley v. Fisher*, 9-520.

11. RIGHT OF SUBSCRIBER ON ASSIGNMENT MADE. Action by assignee of a claim for an amount unpaid on a stock assessment. Defendant, if he be a stockholder in the corporation which executed the assignment, may have a right to know whether or not he is sued by a purchaser for value. He can, therefore, show the consideration of the assignment; *Wells et al. v. Rogers*, 9-487.

12. ASSIGNMENT EXECUTED IN ANOTHER STATE. A general assignment, for the benefit of creditors, executed in a state other than that of a corporation's creation, which is executed with express reference to the state of its existence, and intended to have its first operation in such state, is to be treated in passing on its validity, contested by a creditor, as though it were originally executed in the state of the corporation's residence; *Richardson et al. v. Rogers*, 7-573.

13. EXHAUSTION OF POWER TO EXECUTE. Where a general as-

signment, for the benefit of creditors, is authorized by the directors of a corporation and executed under it, the assignees enter into possession and proceed to the execution of the trusts imposed and accepted, the assignment being good as against the company, the power of the agent to execute and of the company is exhausted, and the original resolution of authority will not support a further execution, even to avoid invalidity of the first instrument. The company having parted with its title, can not, at will, re-assume it that it may again transfer it; especially where the assignees in possession neither renounce their trust nor waive any right. *Id.*

14. UNAUTHORIZED. A promissory note of a corporation, assigned by an officer, without authority, remains the property of the company, and if collected by the assignee, holding under the invalid assignment, the actual owner may recover against such assignee the amount thereof; *Blood v. Marcuse*, 1-195.

ATTACHMENT.

1. NATURE OF THE PROCEEDING. A proceeding by attachment is the prosecution of a special and extraordinary remedy. Statutes authorizing it are to be strictly construed and can have no force in any case which is not plainly within their terms; *Van Norman v. Circuit Judge for Jackson Co.*, 6-663.

2. INSOLVENCY; ATTACHMENT. Where real estate, belonging to an insolvent bank of the state of Rhode Island, located in Illinois, was attached at the suit of a creditor; held, that a decree of a competent court of Rhode Island finding the bank insolvent, appointing a receiver of its effects, and restraining it from transacting further business, does not constitute any sufficient cause for quashing the attachment writ; *City Ins. Co. of Providence v. Commercial Bank of Bristol*, 5-219.

3. LIABILITY OF MUNICIPAL CORPORATIONS. Under the provisions of the act of the legislature of Alabama, approved February 22, 1866, process of garnishment lies against a municipal corporation to subject the wages or salary of a policeman to the satisfaction of a judgment obtained against him; *City Council of Montgomery v. Van Dorn*, 2-33.

4. PLEADINGS. Under the provisions of this statute, the answer of the corporation is not required to be under its corporate seal, but may be made by the treasurer, upon whom the garnishment is served. *Id.*

5. WAIVER. A municipal corporation may waive its statutory privilege of exemption from garnishment; *Clapp v. Walker & Davis et al.*, 2-294.

6. OF FEES IN THE HANDS OF AN OFFICER. Fees and allowances to jailers being provided by law as necessary to enable them to discharge their official duties, the attachment of the same, in the hands of the sheriff, is prohibited by public policy; *Webb v. M'-Cauley*, 2-341.

7. **ATTACHMENT OF SHARES OF STOCK.** An attachment can not be levied on shares in the stock of a corporation, as property of a debtor, when such shares stand, on the corporate books, in the name of another, regularly assigned and transferred within the knowledge of the company; *Van Norman v. Circuit Judge*, 6-663.

8. **NATIONAL BANK.** The property of a national bank, organized under act of congress of June 3, 1864, attached at the suit of an individual creditor, after the bank had become insolvent, can not be subject to sale, for the payment of his demand, against the claim of a receiver, subsequently appointed, who claims possession of the property; *National Bank v. Colby*, 5-82.

ATTORNEY.

1. **POWER TO RETAIN.** Managing officers of corporations have power to employ attorneys and counselors, without express delegation of power, or formal resolutions to that effect; *Southgate v. Atlantic & Pacific R.R. Co.*, 8-144.

2. **WHO MAY APPEAR.** The managing agent of a corporation, to have authority to appear for his company, in a suit instituted against it, must be one whose powers extend to the whole business of the company and on whom service of summons could be made pursuant to statute; *Lamb v. Gaston & S. G. & S. M. Co.*, 8-300.

3. **APPEARANCE IN SUIT.** The authority for an attorney in fact of a corporation to appear in a suit against it must appear within the terms of the grant of power to him, unless he is a general managing agent of the corporation. *Id.*

4. **INSTANCE.** A director of a corporation retained an attorney and authorized him to retain local counsel to attend to certain suits in which the company was interested. The report of the attorney originally retained, of his retainer of the local counsel, to the director was legal notice to the corporation, and the continued silence of the director was, in law, a ratification, by and through him, of the corporation of the original attorney in the premises; *Pittsb., Cin. & St. L. R.R. Co. v. Woolley*, 7-170.

5. **PROOF OF VALUE OF SERVICE.** In a suit, against a corporation, to recover for professional services, proof that the services of a good attorney, at the place where plaintiff was located, were worth a specified sum is not competent. The attention of the witness should be called to the particular services rendered and his opinion should be thereon predicated; *Southgate v. Atl. & Pac. R.R. Co.*, 8-144.

See OFFICES AND OFFICERS.

B.

BANK AND BANKING; see, also, **NATIONAL BANKS**.

1. **STATUTORY.** No association of persons can acquire corporate existence, under the free banking act of Louisiana, without com-

plying with all the conditions precedent prescribed for incorporation thereunder. No corporation organized under the general incorporation law can engage in banking; *Workingmen's Association Bank v. Converse et al.*, **7-203**.

2. **LIMITATION OF ACTS.** A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of its charter; *Weckler v. First Nat. Bank of Hagerstown*, **7-354**.

3. **AMENDMENT OF CHARTER.** Where one, who is a stockholder in a corporation which possesses banking privileges, is conversant with its affairs and does not object to the amendment of its charter and consequent changes in its business, if he participate in the benefits derived therefrom he can not avoid a personal liability, to creditors, by reason of such amendment; *Dow v. Naper*, **6-424**.

4. **INVESTMENT NOT.** The investment of premiums, etc., received by an insurance corporation, in secured loans, is not an act of banking; *Life Association of America v. Levy etc.*, **7-264**.

5. **RELATION OF BANK AND DEPOSITOR.** The relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. Deposits, when received and credited to the depositor, unless there are stipulations to the contrary, become the property of the bank, and part of its general fund, and may be loaned by it as other moneys. The bank is responsible for the deposits, which it receives, as a debtor, agreeing to discharge the indebtedness by honoring the depositor's checks; *Bank of the Republic v. Millard*, **3-22**.

6. —. Where money has been deposited with a bank, on drafts, etc., to be collected in money, and there has been no contract or understanding that a different rule should prevail, the bank where the deposit is made ordinarily becomes the owner of the money and, consequently, a debtor for the amount collected and under obligation to pay on demand, not the identical money received, but a sum equal in legal value. Yet this does not apply where the thing deposited was not money, but a commodity, such as "confederate notes" and it was agreed that the collection should be made in like notes. The fact that the collecting bank used the notes in its business does not alter the case; *Planters' Bank v. Union Bank*, **3-23**, note 3.

7. **PRESIDENT.** Even if it is within the authority of a president of a national bank to bind the bank by an agreement with the acceptor of a draft which is discounted by the bank, not to enforce the draft against him, yet oral evidence of such an agreement is not competent in defense of a suit, by the bank, against the acceptor; *Davis, rec'r, v. Randall*, **5-455**.

8. **CASHIER.** The cashier of an incorporated bank is the general executive officer, to manage its affairs in all things not peculiarly committed to the directors, by the charter, and he is the agent of the corporation and not of the directors; *Bissell et al. v. First Nat. Bank of Franklin*, **4-120**.

9. **CASHIER — ACTS OF.** The habitual exercise of power by the cashier of a bank with the knowledge and acquiescence of the bank establishes, as to the public, the existence of such powers as fully as the same could be established by the order of the board of directors; *Merch. Nat. Bk. v. State Nat. Bk.*, 3-25.

10. **CASHIER — HIS OFFICE.** The cashier is the general executive officer of the bank. His power may be limited by order of the board of directors, but such limitation will bind only those who have knowledge thereof. *Id.*

11. **TRANSACTIONS NOT AT OFFICE.** It is not essential to the validity of the act of a cashier, as binding upon a national bank, that it should be done at its place of business. *Id.*

12. **CERTIFYING CHECK.** The cashier of a national bank has authority to certify that a check drawn upon his bank is good, and thereby render it equivalent to a certificate of deposit in the hands of the holder. *Id.*

13. **LIABILITY FOR ACTS OF.** The rule that those who create a trust, appoint a trustee, and clothe him with powers which enable him to mislead, shall suffer from the misconduct of such an officer rather than another party, is applicable to the transactions of a cashier of a national bank. *Id.*

14. **LIABILITY FOR HIS FRAUD.** The cashier of a bank, having ostensibly the powers usually given to the cashiers of such institutions, received notes, drafts and checks sent to his bank for collection with instruction to protest and return them if they are not paid. Colluding with the drawer to permit his over due paper to accumulate in the bank, he neither protested nor returned the same to the owners, nor entered it upon the books of the bank, nor in any other manner gave notice to the directors of its possession and non payment. Held, that the bank was liable to the owners of such paper for the amount thereof, in the absence of any showing of knowledge on his part of the fraudulent conduct of the cashier; *National Pahquioque Bank v. First National Bank of Bethel*, 3-176.

15. **LIABILITY FOR PURCHASES.** If the cashier of a national bank buy coin without authority and it actually goes in to the funds of the bank, the bank is liable therefor, upon the principle of quantum valebat; *Merchants National Bank v. State National Bank*, 3-25.

16. **BANK TELLER'S BOND.** A bank teller's official bond covers any duty to which, in the natural course of the business of the bank, he may be assigned by the cashier, or other proper officer, in the temporary absence of the person whose duty it would be to perform it; *Detroit Sav. Bk. v. Zeigler et al.*, 9-480.

17. **POWER TO PROVIDE INVESTMENT DEPARTMENT.** Where, by its charter, a banking corporation is authorized to contract and agree with persons desiring to make deposits or loans of money, as to the terms and give its note, bond, or certificate for the amount

and secure the same by pledge, chattel mortgage, note, securities, or by real estate mortgage or deed of trust, as agreed upon, it may provide a system for securing loans and deposits generally, in a particular way, or by providing an investment department, in which certificates issued for loans and deposits are secured by the transfer to a trustee of notes, etc., to be held by the trustee, solely for the benefit of depositors and others dealing with such bank, or agency of the bank; and, the general creditors of the bank, as depositors and lenders not thus secured, will not be entitled to share in the securities, so transferred in trust, until those so secured are first paid; *Ward, rec'r, v. Johnson et al.*, **6-462**.

18. **DEPOSITS.** The rule is, a deposit is general unless the depositor makes it special, or deposits it expressly in some particular capacity. Where a deposit is general, there is an implied undertaking, on the part of the bank, to restore, not the same funds, but an equivalent sum, whenever it shall be demanded; *Ward, rec'r, v. Johnson*, **6-462**.

19. **CHANGING NATURE OF DEPOSIT.** While, if a deposit be made in trust any investment of it, in public or other securities, will also be in trust, upon a perversion of which the depositor, at his election, may follow and re-claim it wherever it can be distinctly identified, a by-law which declares that all savings deposited, over and above such sums as it may be expedient to reserve for immediate use, shall be invested in stocks and obligations of the United States, or of this state, etc.; but, which does not declare that such investments are to be made for the benefit of depositors, nor assume to give them the right to control, or withdraw, them on any contingency, will not render the investments trust property, and the bank may sell, assign, or pledge, or mortgage them, in good faith, to secure other loans or deposits. *Id.*

20. **DEPOSITOR'S LIEN.** A lien in favor of a depositor can only be created by mortgage or pledge. A promise, by the officers of a bank, to savings' depositors, to keep and use the securities taken on loans, or by way of investment, for their benefit, can not be held to create a mortgage, or pledge, of such securities, nor as creating a trust. *Id.*

21. **NAME AS AFFECTING NATURE OF DEPOSITS.** A bank being a stockholders' commercial bank — not a savings bank — of which the stockholders own the capital and the corporation is but a trustee, for such stockholders, in its management, it would seem the name, as savings bank, in the absence of proof that the depositors were deceived and deluded thereby, is of no importance, as tending to render the deposits made trust funds, so that the money deposited shall remain that of the depositor. *Id.*

22. **CERTIFYING CHECK.** The legal effect of identifying a check, in the usual form, is to vouch for the genuineness of the drawer's signature, that he has funds sufficient to meet it, and that

such funds shall not be withdrawn from the bank except upon such check; *Marine Nat. Bank v. National City Bank*, 5-557.

23. CERTIFYING CHECK. It does not warrant the body of the check, either as to payee or amount. *Id.*

24. —. So, where one certified a check, altered as to date, name of payee and amount, and subsequently paid the same, it was held it could recover the sum paid, as being paid by mistake. *Id.*

25. EFFECT OF BY-LAW. In the absence of proof that the holders of certificates of deposit have such knowledge of the by-laws of the bank as to be bound and concluded by them they can not be affected by any disobedience of the directors and officers of the corporation to its by-laws, directing the investment of savings' deposits in certain designated securities; *Ward, rec'r, v. Johnson et al.*, 6-462.

26. BY-LAW CONSTRUED. A by-law of a banking corporation, having power, under its charter, to receive deposits, either as savings or in trust; that deposits, of one dollar and upward, may be received from any person, etc., to be held in trust for them, does not show that all deposits were held in trust, but the reverse. Where the charter confers power to make such special regulations in reference to the trust funds, deposits or savings as shall best aid depositors, it plainly shows trust funds, deposits and savings were regarded as separate and distinct; neither included within the other. *Id.*

27. —. A by-law of a banking corporation that deposits may be received and paid in gold, or silver, coin, or in such funds as may be current in the city where the bank is located, or as may be arranged by special agreement, made in writing, by the president etc., is a clear recognition that the deposits become debts of the bank, and authorizes the officers named to stipulate, for payment, without reference to the securities in which they may be invested. *Id.*

28. —. A by-law, of a bank, authorizing a savings' deposit to be withdrawn, after giving a certain notice, without regard to the condition of the investment at the time, indicates that the depositor has no trust in the investment. If he had a trust in the investment, he could not withdraw his deposit without regard to the investment; for, if loaned on note secured, he must await its maturity and collection, or withdraw the note and security; so an agreement to pay interest, semi-annually, on such deposits, at all events, shows, clearly, the deposits are not in trust. *Id.*

29. RIGHT TO SHARE IN PROFITS. Where a banking corporation is constituted of stockholders its property belongs to such stockholders and the bank is carried on for their benefit. The profits belong to them. Ordinarily, the depositor is but a creditor, entitled to receive his deposit, with such interest as, by contract, his deposit may have earned. *Id.*

30. LIEN ON DIVIDEND. A bank may hold a cash dividend as pledge for an indebtedness of a stockholder to the bank. A demand by the shareholder for the payment of such dividend made, while the lien continues, is premature; *Hager v. Un. Nat. Bk.*, 5-417.

31. PRIORITY OF BILL HOLDERS. The statute, of the state of Georgia, which gives to the holders of bills of a banking corporation priority over other persons in the payment of its debts applies only where there has been a forfeiture of charter by adjudication of court; *Dobbins v. Walton, ass'ee*, 1-317.

32. USURY. A statute authorized the formation of banking corporations, with power to loan money at a rate of interest not exceeding ten per cent. per annum. A promissory note taken to evidence a loan made at a greater rate of interest is not void; *Farmers & T. Bk. v. Harrison et al.*, 8-129; *Rittenhour v. Harrison et al.*, 8-137.

33. ULTRA VIRES. The charter of a corporation (L., N. Y., 1870, ch. 685) granted authority "to grant, bargain, sell, buy or receive all kinds of property . . . or to hold the same in trust, or otherwise, . . . and to advance moneys, securities or credits upon any property." These provisions do not confer banking powers, or authorize the company to discount commercial paper; *N. Y. State Loan & T. Co. v. Helmer, impl.*, 8-594.

34. IMPAIRING SECURITY. It is not within the scope of the authority of the officers of a bank, to consent to an arrangement by which the security of the bank, on negotiable paper due to it, will be impaired; *Gallery v. Nat. Ex. Bk. of Albion*, 6-632.

35. LIABILITY FOR LOSSES. The directors of a bank are not liable for losses sustained by the corporation, by the fraud and default of its cashier, unless it be shown that they have been guilty of fraud, bad faith, or such gross negligence as would imply bad faith; *Dunn's Adm'r v. Kyle's Exec'r*, 7-174; *Moran's Adm'r v. Kyle's Exec'r*, 7-174; *Dunn's Adm'r v. Davis*, 7-174.

36. NOTICE OF EQUITIES. Where a negotiable promissory note is discounted by a bank, through its cashier, the mere fact that such cashier was a stockholder and director of the corporation, and payee and indorser of the note, will not charge the bank with notice of any equities against the paper; it affirmatively appearing that the cashier had no duties to perform in reference to the note, either as stockholder or director of the payee, and it had no actual notice of any equities against the note; *First Nat. Bk. of Rock Island, Illinois, v. Loyhed*, 8-11.

37. FORGED INSTRUMENT. A mistake in recognizing a forged instrument in writing, is binding only, when the forgery is such that it ought to have been detected by a bare inspection of the instrument itself, without reference to books, or any thing outside of the document presented, even the memory of the party, as to the written obligations which he has issued; *National Bank*

of Commerce in New York *v.* National Mechanics Banking Association, 4-605.

38. **LIABILITY; RAISED CHECK.** A bank is not bound to know the handwriting or genuineness of the filling up of a check. It is legally concluded only as to the signature of the drawer, and its own certification. *Id.*

39. —. Where a bank has, by mistake, paid to a bona fide holder the amount of a certified check, which, after certification, had been fraudulently altered by raising the amount, it was held that it could recover, the sum paid, back, unless the holder had suffered loss, as a consequence of the mistake. *Id.*

40. **EFFECT OF PUBLICATION.** A circular, issued by a banking corporation, which declares that the capital and stock of the bank constitute a capital, or safety fund for the benefit of savings' depositors, does not declare that the capital and stock of the bank belong to such depositors, nor does it amount to a legal declaration of trust in that regard. It falls far short of the creation of a trust and it does not have the elements of an estoppel in pais; *Ward, rec'r, v. Johnson*, 6-462.

41. **ASSIGNMENT IN TRUST.** Where a commercial bank has made an assignment in trust, for the benefit of a certain class of loans and deposits, under which it receives moneys, the holders of its certificates of indebtedness, made under such arrangement for securing payment, will not be bound by any previous representations of the officers of the bank that the capital stock is a safety fund for the benefit of savings' depositors, in a case where it is not shown they caused, or encouraged, such representations to be made, or even knew they were made at the time they acquired their certificates. Still less will it be so when it is not shown that the savings' depositors relied upon the truthfulness of the representations. *Id.*

42. **WHAT IS NOT.** A corporation, the only business of which is the investment of its own capital in mortgage securities on real estate and selling such mortgage securities with its guaranty, lends its own money and sells its own property, and is not a bank, or a banker, within the meaning of section 6407, of the revised statutes of the United States, relative to internal revenue; *Selden v. Equitable Trust Co.*, 6-5.

43. **INSOLVENCY; ATTACHMENT.** The property of a national bank, organized under act of congress of June 3, 1864, attached at the suit of an individual creditor, after the bank had become insolvent, can not be subject to sale, for the payment of his demand, against the claim of a receiver, subsequently appointed, who claims possession of the property; *National Bank v. Colby*, 5-82.

44. —; **ABATEMENT OF SUIT.** A suit instituted against a national bank, by a creditor to enforce the collection of a demand, is abated by a decree of United States court, forfeiting its rights

and franchises and dissolving it, rendered upon an information, against the bank, filed by the comptroller of the currency. *Id.*

45. LIQUIDATION; REALTY. That the trustees of a bank in liquidation are without power, as such, to acquire real property, does not include that they can not, through the medium of a trustee, enter into an arrangement by which the bank officers may secure a sale of land for the payment of a debt due the bank, such officers not themselves assuming to take title, control or ownership of the property; *Zantzingers v. Gunton*, 5-49.

46. DISSOLUTION; EXPIRATION OF CHARTER. Want of power in a bank, or a trustee, to wind up the affairs of a bank on its dissolution by the expiration of its charter, to purchase and hold real estate, does not render void an arrangement whereby land subject to a lien, in favor of the bank, and other incumbrances, is discharged of those incumbrances, by aid of money advanced from the assets of the bank, then sold and the whole proceeds realized for the bank; provided the legal title, or the absolute equitable ownership and control of the property is not passed through the bank or its trustees. *Id.*

47. PARTIES TO SUIT. In an action to recover losses occasioned by the gross negligence of directors, the corporation and receiver, if one has been appointed, are necessary parties. If the proceeding be by stockholders, they must be parties defendant; *Brinkerhoff v. Bostwick*, 9-610.

48. ACCOMMODATION PAPER. It is no defense to a suit against the acceptor of a draft, which has been discounted and upon which money has been advanced by plaintiff, that the draft was accepted for the accommodation of the drawer; *Ward, rec'r, v. Johnson*, 6-462.

49. ACTION; NO DEFENSE. It is no defense to an action brought by a bank against its late cashier, for a wrongful appropriation of moneys, that at the time of such appropriation he was the owner of four-fifths of the stock of the bank, and has, since that time, sold all of said stock to other parties, who are now the officers and managing authority of the bank; *First Nat. Bank of Fort Scott v. Drake*, 9-340.

50. PRIORITY OF LIEN. Where a bank holds a judgment which is a first lien upon real estate and an arrangement is made between the officers of the bank and the parties to a mortgage, subsequently executed upon the same premises, that the mortgage is to be considered a lien prior to the judgment of the bank, but the records continue to show the judgment to be prior and paramount and the premises are sold under the judgment, and an innocent purchaser for value without notice acquires title thereto, such purchaser is not subject to the equities in favor of the parties having title under the foreclosure of the mortgage; *Baker et al. v. Woolston*, 9-321.

51. FORFEITURE OF CHARTER. Before suit for the forfeiture of

a bank charter, in the city of New Orleans, can be entertained, it is indispensable that a petition for such forfeiture shall be presented by the attorney general, the district attorney, or both; *State of La. v. Citizens' Sav. Bk.*, 7-250.

52. **PENAL LAWS OF ANOTHER STATE.** The courts of Illinois will not take jurisdiction of a suit by a corporation created by and existing under the laws of and doing business in another state against a national bank organized under the laws of the United States, for the recovery of a penalty, provided for by act of congress, for receiving interest over and above the rate allowed by the laws of the state where the bank is located and transacts its business, that being also a foreign state; *Missouri River Telegraph Co. v. First Nat. Bk. of Sioux City*, 5-322.

See NATIONAL BANKS.

BANKRUPTCY.

1. A court of bankruptcy has jurisdiction to make an order that the balance upon stock of a bankrupt corporation unpaid in the hands of shareholders should be collected from such shareholders, as the directors, under the instructions of a majority of the stockholders, might, before the decree in bankruptcy, have done; *Sawyer v. Upton*, 1-125, note 2.

2. **OF CORPORATION.** The holder of a promissory note, made by a corporation, is not debarred from taking judgment against the corporation, by proceedings in bankruptcy against the corporation; *Athol Nat. Bk. v. Hingham Manuf. Co.*, 7-461.

3. —. Nor by his having proved the note in bankruptcy against the indorsers. *Id.*

4. **DISSOLUTION BY BANKRUPTCY.** A corporation which is insolvent and has been adjudicated a bankrupt, under the federal bankrupt act, is dissolved. A dissolution so effected authorizes creditors to maintain an action against the stockholders of the defunct corporation in Missouri, without joining the company; *State Sav. Assoc. v. Kellogg et al.*, 8-95.

5. —. Bankruptcy of a corporation and proof of a creditor's claim against the estate in bankruptcy do not dissolve the corporation or prevent a recovery of judgment against it for the purpose of charging the officers and stockholders therewith; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

6. —. Bankruptcy does not put an end to corporate existence nor vacate the office of the directors. A corporation created by a state can not be dissolved by an act of congress or by the administration of such enactment by a federal court; *Holland v. Heyman*, 7-10.

7. **UNPAID SUBSCRIPTIONS.** Unpaid subscriptions of stock form part of the assets of a corporation. If the corporation be adjudged bankrupt and an assignee in bankruptcy be appointed, unpaid subscriptions pass to the assignee. Action for the recovery thereof

can be prosecuted, only, in his name; *Lane et al. v. Nickerson et al.*, **6-513**.

8. **ASSIGNEE.** An assignee appointed under the bankrupt law of the United States, represents both the corporation and its creditors. The defense of irregular organization can not be urged against him; *Chubb v. Upton*, **6-23**.

9. **PURCHASE OF CLAIMS BY DIRECTORS.** A corporation having been adjudicated a bankrupt, a member of its board of directors in existence at the date of the act of bankruptcy can not buy up claims against it, at a discount, and entitle himself to credit therefor, at full face value, on settlement with creditors on his personal liability as a stockholder; *Holland v. Heyman*, **7-10**.

10. **EFFECT OF ON LIABILITY ON STOCK.** The bankrupt law of the United States (Rev. Stats., § 5117, 2 ed., 1878, 986), provided that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." An action was brought against a discharged bankrupt, to recover a balance due on subscription to the stock of a corporation. There is nothing of a fiduciary relation, or character, created by the subscription, other than exists from the ordinary relation of debtor and creditor and, certainly, none to bring it within the meaning of the statute; *Morrison et al., receivers etc., v. Savage*, **7-437**.

11. —. It is no defense to a bill, in equity, to enforce the statutory liability of stockholders or directors of a corporation that, at the time of demand made on an execution issued on judgment recovered in the original action and at the time of filing the bill, the corporation was in bankruptcy, and its property in the possession of an assignee; *First Nat. Bk. v. Hingham Manuf. Co.*, **7-496**.

12. —. Nor will such proceeding to enforce the personal liability of stockholder or director, be barred by the fact that the creditor has proved his demand against the corporation, in bankruptcy, and received dividends thereon. *Id.*

13. **LIABILITY OF ORIGINAL STOCKHOLDER.** The original holder of corporate stock is liable for unpaid assessments thereon, without an express promise to pay them. Any contract between the corporation, or its agents, and the stockholder, limiting this liability is void as to creditors or assignee in bankruptcy; *Upton, assignee, v. Tribilcock*, and *Webster v. Upton, assignee*, **5-111, 120**.

14. **LIABILITY OF ASSIGNEE OF STOCK.** Assignee of corporate stock, who has caused the evidences thereof to be transferred to himself, on the books of the corporation, and holds it as collateral security, for a debt due from his assignor, is liable for any unpaid balance due thereon, after the company has become bankrupt; *Pullman v. Upton*, **6-34**.

15. **BANKRUPT AS VOTER.** That one has been adjudicated a bankrupt and that his estate has passed to his assignee will not affect his right to vote on stock which stood in his name and has not been formally transferred on the books of the company; *State etc. v. Ferris et al.*, **6-312**.

16. **DISCHARGE AS A DEFENSE.** Bankruptcy, and discharge under it, being in the nature of a personal defense, must be pleaded in the trial court; *Collins et al. v. Hammock*, **1-143**; *Collins v. Garrett*, **1-143**.

17. **COMPOSITION AND RELEASE.** A director, or stockholder, of a corporation being liable as an indorser on the note of his company becoming bankrupt and, in proceedings for a composition, receiving a release from all liability as such indorser, can not urge that fact in defense to a bill in equity, against him and other directors and stockholders, to enforce their personal liability, as stockholders on the same note and other corporate debts; *First Nat. Bk. v. Hingham Manuf. Co.*, **7-496**.

BAR TO ACTION.

1. **APPROVAL OF SALE.** The finance committee of a corporation — a savings bank — by vote, instructed its treasurer to sell certain property of the bank at not less than a price named. The treasurer sold the property to himself and other members of the finance committee, for the price named, which was less than the market value of the property, and entered the amount on the cash book of the corporation. This approval was no bar to an action by the bank against the treasurer, to recover the difference between the market value of the property and the price paid, it not appearing that the attention of the trustees was called to the entry in the cash book; *Greenfield Sav. Bk. v. Simons*, **9-451**.

2. **BY-LAW AS A BAR.** By-laws of a mutual benefit association provided for an adjudication of all claims for relief by tribunals of the association and expulsion of any member who should pursue such claim in the courts. Proceedings had before such tribunals will bar recovery in court; *Osceola Tribe v. Schmidt*, **9-387**.

BENEFIT SOCIETIES.

1. **THEIR NATURE.** An association of persons desiring to become incorporated, made a certificate in which it was stated "the object for which the said society is formed is benevolent; by the association and co-operation of its members, by their contributions and the contributions of others, to provide a relief fund; also, to aid persons of moderate pecuniary resources in obtaining, from a reputable insurance company, insurance upon their lives, and in maintaining the necessary payments on the same, and to secure to families of persons, so insured, an immediate advance of funds, in case of death." Upon an application for mandamus, to com-

pel the secretary of state to file the certificate, held this was evidently a corporation for business purposes, having in view pecuniary gain and profit to the corporators. It may contemplate the promotion of the temporal interests of others, but such object is merely incidental to the chief end of the association; *People, ex rel. Blossom et al., v. Nelson*, 4-554.

2. POWER TO ORDAIN BY-LAWS. A beneficial association is formed for the benefit of its members. It is a purely volunteer association and it may adopt such reasonable regulations as are conducive to the interests of the members; *St. Mary's Beneficial Society v. Burford's adm'r*, 4-125.

3. —. Volunteer beneficial societies may, by by-law, prohibit their members from indulgence in vices which multiply disease and death among them, and thus diminish their general funds. *Id.*

4. CONSTRUCTION. A by-law of a beneficial society, which makes the payment of a sum, in case of death, contingent on the orderly conduct of the member, is not expulsion or a total denial of benefits, but the loss of benefits, *pro hac vice*; the membership remains and the title to benefits remains and attaches to every case of death not resulting from the prohibited vices. *Id.*

5. INSTANCE. The charter of a benefit society stated its object to be to afford relief to its members and their families and to defray expenses of their funerals or of such other cases of distress as should be defined by the by-laws. It authorized the association to make by-laws necessary for its government and, generally, to do the matters and things lawful for them to do for the well-being of the society, etc. A by-law provided that, at the death of a member "entitled to benefits," a fixed sum should be paid to his widow or legal representative, but, that the stewards "shall withhold all benefits when intemperance, debauchery, fighting, dueling or other disgraceful practices are the cause of disease or death." Upon action brought to recover the sum fixed as payable upon death, held, that this provision was within the power of legislating for the well being of the society, and is reasonable. *Id.*

6. JURISDICTION OF COURTS. Where a beneficial society has decided, under its by-laws, that a member is not entitled to benefits, that decision is conclusive on him; *Osceola Tribe, I. O. R. M.* . Schmidt, 9-387.

7. —. Every person who joins such an association assents to the laws adopted for the government of the association, and, where a member is subjected to the general rules and by-laws of the association, according to the usual course, and the tribunal of his own choice has decided against him, he ought not to complain. *Id.*

8. INSTANCE. The by-laws of a mutual benefit association provided that whenever a member had cause of complaint, on questions having relation to his enjoyment of benefits, he should seek redress from his tribe, and if the decision was against him, by an

appeal from its decision to the grand tribe of the state, and, thereafter, to the grand tribe of the United States and, should he neglect to pursue such a course and bring suit in a tribunal outside the order, he should be subject to expulsion. Appellee's intestate, a member of the association, pursued the course prescribed, and his suit having been decided against him, suit was brought to recover sick benefits from appellant. Held, that the proceedings mentioned bar recovery. *Id.*

9. **POWER TO LEASE.** When the trustees of a secret benevolent society are invested with general power to manage its property, a lease of the meeting room of the corporation to another society for use during some night of each week is not beyond their power and is valid; *Philip et al. v. Aurora Lodge, I. O. G. T. et al.*, 9-274.

See **BY-LAWS, 53-67; SOCIETIES-BENEFIT.**

BENEVOLENT ASSOCIATION.

1. **DISTINGUISHED FROM A CHARITY.** A beneficial society whose benefits and benevolence are confined exclusively to its contributing members is not a charitable use within the 11th section of the act of Pennsylvania in relation to bequests to charities; *Swift's executors v. Beneficial Society of the Borough of Easton*, 5-605.

2. **PRIVATE SAVINGS BANKS ARE NOT.** A savings association, formed for the pecuniary profit of its members, is not a benevolent or charitable society, within the meaning of public statutes, chapter 17, §§ 56 and 57, which authorizes two or more persons desirous of forming any benevolent or charitable society to become a corporation; *Sheren v. Mendenhall et al.*, 7-607.

3. **INCORPORATION.** A statute provided for the incorporation of a benevolent association by an election, in such mode as its rules or regulations may direct, of trustees to take charge of its estate and property; and, upon such appointment or election, a certificate thereof shall be executed by the person or persons making the appointment or the judges holding the election stating the names of the trustees or directors, and the name by which said trustees shall thereafter be called and known shall be particularly mentioned and specified. Under such act it is not essential the certificate should show such persons constituted an existing society with rules and regulations, or that the rules and regulations under which they act be set forth in the certificate, or that the choice of trustees was, in fact, made under them; *Roman Catholic Orphan Asylum v. Abrams*, 6-222.

4. **CORPORATE RESIDENCE.** Under such an act the county in which the society is located is not an essential of the certificate of incorporation. *Id.*

5. **CORPORATE NAME.** To state the society shall be called the Roman Catholic Orphan Asylum, is sufficient compliance with a statutory provision requiring that the name by which said trus-

tees shall thereafter, for ever, be called and known "shall be particularly mentioned." *Id.*

6. ELECTION BY PROXY. The charter of a benevolent society authorized the election of directors or managers at such time and place and in such manner as might be specified by its by-laws and gave power to make by-laws consistent with law. The state constitution, adopted since the charter was accepted, required the passage of a statute authorizing proxy votes at elections held by incorporated companies. A by-law ordaining a right to vote by proxy is lawful; *People, ex rel., v. Crossley et al.*, 5-240.

7. REVIEW OF ELECTION. At an election of directors of an incorporated benevolent association, votes by proxy were received under a by-law adopted at the meeting for election. The sole objection made was as to the right to vote by proxy under the by-law. On quo warranto to try the title to office of the directors declared elected, held, in the absence of objection made at the time of election, or to the form, execution or validity of the proxies received and acted upon, it is to be presumed that they were regular and proper. *Id.*

8. ELECTION OF TRUSTEES. If all members of a society join in a certificate of election of trustees it is to be presumed there were no rules or regulations conflicting with the mode they adopted to express their will; *Rom. C. Orph. Asyl. v. Abrams*, 6-222.

9. WHO CAN OBJECT. It is doubtful whether one who is not a member can object to an informality in such organization; as that regulations concerning an election of trustees were violated; where all the members join in assenting to the mode. *Id.*

10. CONSIDERATION FOR DUES. The benefit of membership of a benevolent association affords sufficient consideration to support a promise to pay dues, so long as such membership continues; *United Hebrew Ass'n v. Benshimol*, 7-536.

11. —. It is a sufficient consideration to support a promise to pay dues to a benevolent association that the association has, in reliance upon the payment of these dues, annually expended for charitable purposes a sum equal to their whole amount. *Id.*

12. MEMBERSHIP. The constitution of a charitable corporation provided that any person could apply for admission to membership by paying an admission fee and, when declared elected, could, after signing the constitution, vote at all meetings and be eligible to office, and that each member should pay a certain amount yearly to the corporation. It was held that signing the constitution was not a prerequisite to membership; and that an action would lie by the corporation against the member, who had not signed, for his yearly dues. *Id.*

13. RIGHT OF ACTION AGAINST. The by-laws of an incorporated benevolent society provided for the payment of a stated weekly allowance to a sick or incapacitated member, upon the performance of certain conditions by him. Upon substantial compliance

with the by-laws, the right to the allowance rests in the sick or disabled member, and should the society refuse to fulfill its contract, he may maintain an action of law against it, if there be no provision in the by-laws delegating to some tribunal the power to decide questions arising between the society and its members; *Dolan v. Court, Good Samaritan, etc.*, 7-512.

14. **INSTANCE.** The by-laws of an incorporated benevolent society provided that a sick member sending to the society "every week during his sickness" a certificate signed by a qualified surgeon, attending him, stating his illness, should be entitled to a weekly allowance of five dollars. A member of the society was taken ill, in another state; he sent to the society a certificate, stating his illness and signed by one who was, in fact, a surgeon in attendance upon him and who was so described in a letter of transmittal, although not by addendum to the signature placed upon the certificate. No other certificate was furnished until after the member's return to the residence of the corporation, some three months later, when a certificate was furnished stating he had been sick since the date of the first certificate. It was held the first certificate was in substantial compliance with the by-law, entitling the member to receive an allowance for one week; but, that he was not entitled to any further allowance. *Id.*

15. **BEQUEST TO CORPORATION NOT IN ESSE.** The testator bequeathed, in trust, to "the first Calvinist Baptist society that may be organized in" a certain school district, the sum of \$1,000 for the purpose of buying a lot of land and erecting thereupon a meeting-house. Upon objection to the validity of the bequest that there is no such incorporated society, held, that a devise to an unincorporated religious society will be regarded as a bequest to charitable uses and will be enforced; *Swasey, adm'r, etc., v. American Bible Society et al.*, 3-352.

BOARD OF TRADE.

1. **ARBITRATION.** If a board of trade, by articles of association, can acquire the power to arbitrate, as a court, the business disputes of its members, still its decisions are subject to be reviewed and examined by courts as in other cases of arbitration. Wherefore, a defendant in such proceeding has a right to an appeal without conditions to the superior body of the board; *Savannah Cotton Exch. v. State of Georgia, ex rel., Warfield et al.*, 6-343.

2. **ISSUE OF MANDAMUS.** Writ of mandamus properly issued to cause the restoration of members wrongfully suspended from a board of trade. *Id.*

3. —. Courts never interfere to control the enforcement of the by-laws of mere voluntary associations incorporated for the advancement of religious, moral, etc., principles or merely for amusement. Such organizations must be left to enforce their

rules and regulations by such means as they may adopt for their government; *People, ex rel., v. Board of Trade*, 6-365.

4. **BY-LAW; VALIDITY OF.** A by-law of a chamber of commerce, which provided for the suspension or expulsion of a member for "failing to comply promptly with the terms of any contract, either verbal or written," is not unreasonable or unjust, illegal or wrong, even though the contract involved in the offense be such a one as can not be enforced at law as being violative of the statute of frauds. Such a by-law has reference to contracts not made during a session of 'change of the chamber of commerce upon the floor of the chamber of the corporation, at least, when such contracts are entered into between the members of the association; *Dickenson v. Chamber of Commerce*, 4-229.

BOND.

1. **AUTHORITY TO ISSUE.** Business relating to the legitimate purposes of a corporation, as stated in its charter, may be transacted by the board of directors, without the sanction of the stockholders; wherefore, the charter of the corporation providing it shall have power to borrow money and secure the same by deed, or lien, upon its property, real or personal, or both, the borrowing of money for the purpose of forwarding the legitimate objects of the company is within the power and the board of directors was empowered to so borrow and secure by mortgage, and whether such acts were or were not ratified by the stockholders the bonds and the deed securing them would be valid and binding; *Wood et al. v. Whelen*, 6-442.

2. **RATIFICATION OF PLEDGE.** Secretary of a corporation having, without express authority, pledged the corporate bonds, secured by recorded deed of trust, for an existing indebtedness and future advances, but with the knowledge and acquiescence of the directors, his act will be binding in the absence of fraud; *Darst v. Gale et al.*, 6-380.

3. **PLEDGE.** Where the bonds of a corporation were issued on the understanding that they were to be sold for cash, but, as a fact, they were pledged to a creditor, as collateral security to corporate notes executed to and held by him, the objection that such disposition is unlawful is one open to the corporate body or its stockholders alone; *Beecher v. Marquette etc. Co.*, 6-665.

4. **CONVERTIBLE.** Bonds of a corporation were issued convertible into common stock of the company until a day named. Upon bill to foreclose the mortgage given to secure the bonds, judgment creditors objected that the bonds were invalid by reason of this condition of conversion, claiming it was equivalent to an increase of the stock of the company without the assent of the stockholders. It was held, the provision could not operate to excuse the company from the payment of money it had obtained on the faith of the bonds, which the mortgage was given to secure, wherefore, this

condition in the bond did not infect the mortgage; *Wood et al. v. Whelen*, **6**-442.

5. OF OFFICERS. Sureties on the bond of an officer of a private corporation, whose office is annual, with power in him to hold over until his successor is elected, or appointed, and qualified, are bound only for the year for which he was chosen and for such further time as is reasonably sufficient for the election and qualification of his successor. A condition in such bond guaranteeing the good faith and honesty of such an officer "during his continuance in office," does not mean for an indefinite period, or for the time he may remain in office under new elections, but for the space of his continuance in office under the then election and for the legal term; *Mutual Loan & Build'g Ass'n v. Price*, **6**-336.

6. —. When the tenure of the office is for a fixed period of time, the sureties upon the bond, for the faithful performance by the incumbent of the duties of the office, are not liable for any defaults of the principal occurring under a new appointment, after the fixed period has expired, unless the bond contains stipulations that such sureties shall be liable during any successive term of office to which the principal may be elected or appointed; *Trustees v. Dean et al.*, **7**-531.

7. —. If the tenure of an office be for an indefinite and not a fixed period of time, the sureties on a bond given, for the faithful performance of the duties of the office, which does not contain any stipulation limiting the period for which they shall be liable, are liable so long as the principal shall continuously hold the office. *Id.*

8. INSTANCE. A fund was left by will, for a charitable purpose, to be managed by trustees to be chosen once in three years. The trustees were incorporated by an act which gave the corporation power to appoint officers, and provided that the then officers should hold their offices until others were chosen in their places. R., who had been treasurer of the trustees, was chosen treasurer for the term of three years, and gave a bond conditioned that he would account for the funds of the corporation deposited in and which should come to his hands and would faithfully perform the duties of his office. This was not a continuing bond. *Id.*

9. OF OFFICER. The obligation of an official bond is strictissimi juris and nothing can be taken by construction against the obligors; the sureties do not undertake for any thing beyond the letter of their contract and are only liable within its terms; *Detroit Savings Bank v. Zeigler et al.*, **9**-480.

10. SCOPE OF. Where an officer or agent executes a bond, conditioned, in general terms, for the faithful performance of his duties, it extends to and covers all acts done within the general scope and authority of the officer or agent; *Tyler et al. v. Old Post Building Association*, **9**-272.

11. —. The by-laws of a corporation—in this case a build-

ing association — required dues and assessments to be paid to the secretary at weekly meetings, and, also, required that officer to give bond for the faithful performance of his duties. It was held, that a bond executed under this direction, covered all money received by such officer in his official character, whether paid at the time required or not. *Id.*

12. SCOPE OF. A bank teller's official bond covers any duties to which in the natural course of the business of the bank he may be assigned, by the cashier or other proper officer, in the temporary absence of the person whose duty it would be to perform them. So, where the receiving teller of a bank who, during the temporary absence of the general teller, was assigned to his duties by the cashier, embezzled funds of the bank that so came in his hands, it was held, that the sureties on his bond were liable, though such funds had not come into his hands as receiving teller; *Detroit Savings Bank v. Zeigler et al.*, 9-480.

13. ADDITIONAL EMPLOYMENT. The fact that the book-keeper of a banking corporation performs the duties of teller also, will not relieve the sureties on his bond for the faithful performance of his duties as book-keeper, from liability for errors committed by him in that capacity, unless the errors were, in some way, connected with some improper act on his part as teller, or were superinduced by his employment as such; *Home Savings Bank v. Traube*, 9-512.

14. OF OFFICER. It is a reasonable by-law, on the part of a savings bank, to require its cashier to furnish bond, with security to be approved by the directors, conditioned for the faithful discharge of the duties of his office; and the adoption of such a by-law is within the scope of the power conferred to make by-laws, not inconsistent with existing law; *Savings Bank of Hannibal v. Hunt*, 8-271.

15. —. It is the settled doctrine of Missouri that an officer, elected or appointed, to hold for a definite period of time and until his successor shall be duly elected and qualified, holds for the specified term, and if no successor be elected, or appointed, at the expiration of the time, his term of office continues until such appointment, or election, and that the time during which he holds, after that specified time has expired and until a successor is elected and qualified, is a part of his term of office. If there be no election of a successor, the liabilities of his sureties upon an official bond taken of him continues, the bond being kept alive until office expired. *Id.*

16. —. Where an officer — in this case the cashier of a savings bank — gave a bond with sureties, which was silent as to the term of his office and as to the period of the liability of suretyship; but by the organic law governing the corporation the term of such officer was fixed for one year and until his successor was duly elected and qualified, and at the expiration of each of two annual

terms he was re-elected and continued to discharge the duties of the office, but gave no new bond, and during the third year of his cashiership he became a defaulter, the sureties were not liable, the bond being without force when the defalcation occurred. *Id.*

17. **INDEMNITY BOND.** If a note be executed by the agent of a corporation, principal obligor on an indemnity bond, to the obligee in such bond, without consideration and after the execution of the bond, the sureties on the bond will not be liable, in an action on the bond, as for a breach on the non payment of the note; *Cox et al. v. Weed Sewing Mach. Co.*, 8-59.

18. **OF AGENT.** Sureties on a bond of indemnity, to a corporation, conditioned to answer for the debts and defaults of the agent of the corporation, the principal obligor. The bond was delivered to the agent — obligor. Such sureties are neither guarantors nor sureties on a guaranty. Wherefore they are not entitled to notice of the obligee's acceptance of the bond or the agent's debts subsequently contracted. *Id.*

19. **RELEASE OF SURETIES.** Sureties upon an officer's indemnity bond are not discharged by the laches of corporate officers in not making examinations into his affairs punctually, according to by-laws, etc., of the corporation; unless there be an admixture of fraud with the delay; *Mut. L. & B. Assoc. v. Price*, 6-336.

20. **ACTION ON; DEFENSE.** In an action, by the holder, on overdue and unpaid obligations, issued by the defendant corporation under its seal, and expressed to be payable to the holder, the fact that the corporation delivered to the plaintiff part of them as collateral security for the payment of the residue is no defense. *Royal Bank of Liverpool v. Grand Junct. R. & Depot Co.*, 1-644.

BOUNTIES.

1. **CONTRACT, WHEN EXECUTED.** A town meeting voted that \$100 should be paid to each person who should "voluntarily enter and be accepted in the United States service." Held, that the right to the bounty was complete when a person had voluntarily entered the service and had been accepted, and that such right was not affected by his subsequent desertion; *Terrell v. Town of Colbrook*, 2-121.

2. **WHEN DRAFT WAS COMPLETE.** A town, in the state of Connecticut, voted, on the 8th day of August, 1863, "that the selectmen be authorized to pay \$300 to every citizen of the town drafted into the service of the United States during the present war, and accepted by the board of examiners, who shall enter said service or procure a substitute;" the plaintiff was notified on the 1st day of August that he had been drafted and was required to appear for examination on the 11th of the same month. It was held, (1) That he was not "drafted into the service" at the time the vote was passed; and that the bounty provided by the vote was not as to him a gratuity. (2) That the vote purported a

promise, and that the payment of the bounty was not discretionary with the selectmen. (3) That the vote of the town, if invalid when passed, was made valid and binding on the town by the act of July 6, 1864. (4) That the "board of examiners" mentioned in the vote, must be taken to mean the "board of enrollment;" *Reed v. Town of Sharon*, 2-123.

3. **CONTRACT CONSTRUED.** The plaintiff volunteered in the military service of the United States, to the credit of defendant's town, under a pending call for volunteers, made by the president of the United States. A few days thereafter the town "voted to raise \$300 for each man who volunteers for one year, to fill the town's quota under the present call for men," and after the vote, and the credit to the town, on account of plaintiff's enlistment, a warrant for the amount named was made to him by the town clerk. Held, that he was within the terms of the vote and the warrant was valid; *Hart v. Holden*, 2-383.

4. **CHARACTER OF CONTRACT.** The validity of the obligations entered into between towns and volunteers depended upon the vote of the towns and the ratifying acts of the legislative authority, and not upon a legal consideration in the ordinary acceptance of the term, or upon the power of the parties at the time to contract. *Id.*

5. **MODIFICATION OF CONTRACT.** The vote was taken on the 14th of January. The plaintiff had already enlisted. On the 15th of February he received a town warrant for the amount voted. On the 17th of the same month the legislature enacted that "the past acts and doings of cities, towns and plantations, in offering, paying, agreeing to pay, and in raising and providing the means to pay bounties to, and notes and town orders given by the municipal officers of any city, town or plantation, in pursuance of a previous vote for the benefit of volunteers, or substitutes for drafted or enrolled men," were made valid. On the 13th of March the town made an order limiting the sum to be paid to those of these volunteers who had been assigned to the coast guard to \$100. Held, that the last act was inoperative and null as to plaintiff. *Id.*

6. **TAX IN ILLINOIS.** The legislature has the power to authorize taxation, by a municipal corporation, for the purpose of refunding money borrowed to pay bounties to volunteers and which was borrowed on the faith that the money advanced would be repaid; *Johnson et al. v. Campbell et al.*, 2-211.

7. **TAX IN MINNESOTA.** The legislature of Minnesota has constitutional power to authorize the levy of a tax for the payment of bounties to persons who enlist in the military service of the United States; *Wilson v. Buckman*, 2-557.

8. —. The legislature of Minnesota may, under the constitution of the state, validate the illegal issue of bonds, by municipal corporations, in payment of bounties to persons enlisting in

the federal armies; *Comer v. Folsom*, 2-555; *Kunkle v. Town of Franklin*, 2-561.

9. CURATIVE ACT. When a tax for the payment of bounties has been levied without legal authority, it may be ratified and legalized by legislative enactment; *Wilson v. Buckman*, 2-557.

BRIDGE COMPANY.

1. INFRINGEMENT OF FRANCHISE. A franchise to erect a bridge, with the right to collect toll and prohibiting the erection of any other bridge within one mile on either side thereof, is not interfered with by a grant to a railroad company of the right to construct a railroad bridge within that distance. The crossing a river by a railroad track on piers is neither a bridge, ferry, nor any public means of crossing by the ordinary modes of travel such as are contemplated in the grant of a toll bridge franchise; *Lake v. Virginia & Truckee R.R. Co.*, 4-526.

2. LEGISLATIVE POWER. Notwithstanding the grant of a ferry franchise, the power and right still exist, in the legislature, to authorize the erection of a bridge in the vicinity, better to subserve the interests of the public; *Piatt et al. v. Covington & Cincinnati Bridge Co.*, 4-401.

3. EXCLUSIVE PRIVILEGES. The establishment of a ferry over and across a river does not vest, in the owner of the franchise, the exclusive privilege of transporting persons and property, for hire, across such river. The legislature may authorize other means of crossing, as it may deem proper, having in view the convenience of the public, increase of travel and the like. *Id.*

4. INTERFERENCE WITH FERRY. Ferries and bridges, under legislative sanction, are not authorized for remunerative purposes to the owners, only, but for the benefit of the public, whose interest is their first and paramount object. In the absence of express law to the contrary, the legislature should not be presumed to have intended to deprive itself of the power of promoting that object. It follows, if the construction of a bridge will interpose no physical obstruction to the enjoyment of a ferry franchise across the same river, the owners of the ferry are not entitled to compensation for any incidental impairment of the profits of their ferry, resulting merely from the use of a bridge instead of a ferry, by the public. *Id.*

5. INCORPORATION. The charter of a bridge company provided that the capital should not exceed \$30,000, and that certain commissioners, named, should receive subscriptions to the stock in a book to be opened for the purpose, at a time and place, of which public notice should be given, and that, when stock sufficient for the construction of the bridge was subscribed, they should distribute it among the subscribers, and appoint the first meeting of the corporation. The stock subscribed was not, by itself, sufficient for the construction of the bridge; but the amount actually

subscribed, taken in connection with a contract by which the town in which the bridge was situated undertook to purchase and pay for the bridge, was sufficient to secure the construction of the bridge. The commissioners treating the amount subscribed as sufficient, distributed the stock among the subscribers, and called the first meeting of the corporators. Held, (1) That the question whether the amount of stock was sufficient, was wholly one for the commissioners to decide; and the town, having contracted with the corporation to purchase the bridge, with full knowledge of the amount of stock that had been subscribed, had no right to complain. (2) That the action of the commissioners was not invalidated by the fact that they did not attend, personally, during the time the books were open for subscriptions, but left them in charge of another person, and only attended for final action after the subscriptions were all made. (3) That the fact that the bridge corporation, when the bridge was completed, conveyed to the town the bridge and the corporative franchise, according to the contract and the provisions of its charter, did not deprive it of its legal existence as a corporation; *Saugatuck Bridge Co. v. Town of Westport*, 4-328.

BROKERAGE.

1. CORPORATE RIGHT. A corporation may do business for another person and, in that sense, become a broker. It does not, however, become a broker by transacting, for itself, such business as it is empowered by its charter to conduct; *Henderson et al. v. State*, etc., 7-45.

BUILDING AND LOAN ASSOCIATION.

1. CURE OF DEFECT IN. In organizing a building association, under the general law of Ohio, of 21st of February, 1867, the certificate of incorporation was, by mistake, acknowledged before a notary public, instead of before a justice of the peace, as by that law required. Under an act of March 10, 1859, proceedings were afterward instituted to correct the error, and decree was so entered; held, that the effect of such correction was to make the association a lawful corporation from the date of its organization, not only against persons dealing directly with the association but as against the whole world; *Spinning v. Home Building & Saving Association of Dayton, Ohio*, et al., 5-601.

2. NOT IN THE EXERCISE OF BANKING POWERS. An act of the legislature of Ohio, of February 21, 1867, authorized the formation of associations for the purpose of raising moneys, to be loaned, among the members, for use in buying lots or houses, or in building or repairing houses. It was objected that this act assumed to authorize the exercise of banking powers, in violation of the constitution of the state. It was held, that the collection of money from the members and the loaning of it among them, for

the purposes provided for, is not the exercise of banking powers; *Forest City United Land & Building Association v. Gallagher et al.*, 5-595.

3. **POWER TO LOAN ON MORTGAGE.** The statute of Alabama authorizing building and loan associations to lend money to their shareholders and to secure the loan on real estate, on such terms and conditions as are prescribed by law, such a loan is not ultra vires the corporation although it may be in contravention of the by-laws; *Kelly v. Mobile Building & Loan Assoc.*, 6-180.

4. **COMPUTATION OF INTEREST.** Building associations are not authorized, in Ohio, to charge interest on the premiums allowed for precedence in obtaining loans. The money actually advanced is the basis for the computation of interest; *Forest City U. L. & B. Assoc. v. Gallagher et al.*, 5-595.

5. **DISTRIBUTION OF ASSETS.** Where a member of a building society assigned the certificate of his shares to a bank in consideration of money loaned him, and subsequently borrowed a sum on the same shares from the society, to which he transferred his stock on the books, the bank failing to produce its shares for transfer, and the society was wound up and its assets distributed under its charter to the holders of stock as by the company books, it was *held*, the directors were not liable to the bank for the sum which would have accrued upon the stock it held had it been properly transferred; *Bank of Commerce's Appeal*, 5-603.

See, also, **LOAN ASSOCIATION.**

BY-LAWS.

1. **POWER TO MAKE.** The power to make by-laws, not inconsistent with its charter or the purpose of its creation, nor repugnant to the common law, is an attribute of every corporation. When duly enacted, such by-laws are binding upon all the members of the corporation, who are presumed to know them, and to contract with reference to them; *Supreme Commandery v. Ainsworth*, 10-1.

2. **MUST CONFORM TO LAW.** All by-laws contrary to the general principles of the common law, or the policy of the state, are void; *People, ex rel., v. Fire Department*, 5-479.

3. **COMPACT WITH STOCKHOLDERS.** A by-law enters into the compact between the corporation, which adopts it, and every taker of a share. It is in the nature of a contract between them; *Kent v. Quicksilver Mining Co. et al.*, 8-614.

4. **INCOMPETENCY TO ADOPT.** A corporation can not make by-laws contrary to its charter; *State of Nevada, ex rel. Corey, v. Curtis*, 5-509.

5. **VOID IN PART, VOID IN ALL.** A single entire clause of a by-law can not be good in part and bad in part; otherwise if it consists of two parts, each entire and both distinct. *Id.*

6. **EX POST FACTO.** A by-law, or regulation, means a rule for

future action. *Ex post facto* laws are no more lawful for corporations than for a state; *People, ex rel. Pulford, v. Fire Department of the City of Detroit*, 5-479.

7. **PERMISSIBLE RULES.** Volunteer beneficial societies may, by by-law, prohibit their members from indulgence in vices, which vices tend to multiply disease and death among them, and thus diminish their means of benevolence; *St. Mary's Ben. Soc. v. Burford's adm.*, 4-125.

8. —. It is a reasonable by-law, on the part of a savings bank, to require its cashier to furnish bond, with surety, for the faithful discharge of the duties of his office. Such a by-law is not inconsistent with law; *Sav. Bk. v. Hunt*, 8-271.

9. **UNWRITTEN.** It is settled that the enactment of a by-law need not, necessarily, be in writing; and, it may be inferred from facts proved; *Lockwood v. Mech. N. Bk.*, 4-140.

10. —. The by-laws of a corporation need not be in writing. They may be adopted as well by the company's conduct and the acts and conduct of the corporate officers as by an express vote, or an adoption in a meeting; *Bank v. Pinson*, 8-69.

11. **VOTES NECESSARY TO ADOPT.** In all cases where an act is to be done by a corporate body, or a part of a corporate body, and the number is definite, a majority of the whole number is necessary to constitute a legal meeting. At such legal meeting, a quorum being present, a majority of such quorum can act. Hence, a by-law adopted at a meeting, at which were present six ad interim directors of a national bank, which bank had twelve directors, is invalid, because not adopted by a quorum or majority of the board; *Lockwood v. Mechanics National Bank*, 4-140.

12. **SIGNING.** A by-law of an association provided that each member admitted should sign the same. The provision of such by-law is simply directory; a mere failure to comply with it, unintentionally, will not invalidate a membership that has been asserted by a party claiming it, and which claim of membership has been recognized, and acquiesced in, by the corporation for a long space of time, without objection; *State of Minnesota v. Sibley et al.*, 7-624.

13. **LIMITATION OF RIGHT TO ADOPT.** Authority of the charter of a corporation to regulate the mode and manner of the transfer of stock, does not include the authority to prevent, or even restrict, the power of disposition; *Bank of Holly Springs v. Pinson*, 8-69.

14. **IRREGULARITIES IN ADOPTING.** Irregularities in the adoption of by-laws, where all the stockholders and officers of the corporation recognize and treat such by-laws as legal and valid, will not relieve a stockholder; who is, afterward, sued for the amount of his subscription to the capital stock of the corporation; from the duty of paying the amount of such subscription; *Ginrich v. Patrons Mill Co.*, 7-142.

15. **NECESSARY INGREDIENT.** All by-laws of corporations must be of uniform operation upon the members of the corporation. No member can be subjected to any condition which does not apply to his associates, nor can he be compelled to receive, as matter of grace, any thing which is his of right. There may not be a personal exemption of a general nature from any valid regulation which binds the mass of corporators; *People, ex rel. Stewart, v. Young Men's Father Matthew Total Abstinence Benev. Soc.*, 6-626.

16. **INVALID.** A by-law of a corporation can not be valid which seeks to impose restrictions upon membership, which are not to be found in, or are in conflict with, the articles of association of a corporation. *Id.*

17. —. No by-law can narrow the plain meaning of articles of association. *Id.*

18. —. A by-law, of a corporation, is invalid which seeks to create officers whose authority is not derived from the members or the board of directors. *Id.*

19. —. No by-law can be lawful which subjects the interest of the corporation to any interference outside of its board of directors. *Id.*

20. —. A charter provided that the membership should consist of not more than one hundred active members and that honorary membership might be bestowed on active members at will. Honorary members are to be elected only from active members, and a by-law authorizing the election of contributing members, in the same manner as active members, is void; *Diligent Fire Co. v. Commonwealth*, 5-613.

21. **LIMITATIONS ON POWER.** Where a total forfeiture of important rights, as of membership, is asserted to have been created by proceedings of which the owner has no actual notice, the party insisting on the forfeiture has the burden of making it out in all particulars. No presumption will be allowed in his favor. The authority must be clearly shown and strictly construed; *People, ex rel., v. Fire Department*, 5-479.

22. **NECESSITY OF BY-LAWS.** In the state of Michigan subscriptions to stock can not be taken, or if taken are not binding, until by-laws have been adopted, if the charter provides that the persons subscribing in the manner to be provided by by-laws shall be a body corporate; *Carlisle v. Sag. V. & St. L. R.R. Co.*, 5-456.

23. **UNREASONABLE.** The defendant canal company established the following regulation: "No boat will be allowed to pass the lock on Sunday without a written permit from the superintendent, or his assistant, and this permit will not be granted unless in case of actual necessity." It was held, in an action for damages, that this was unreasonable and one which neither the board of directors nor its agent could establish, because: (a) It requires, in the

event the navigation of the canal is a necessity and, therefore, lawful, that a permit be obtained from an officer who may not be accessible: (b) It is for the boat owner, for himself, to determine the question of the necessity for Sunday navigation, subject only to his liability under the statute regulating travel on the sabbath day; *M'Arthur v. Green Bay & Mississippi Canal Co.*, 5-625.

24. ENFORCING PENALTY. The only implied means for enforcement of corporate charges and penalties is by action. Summary means and methods, unknown to the common law, must be authorized by express authority, and a pecuniary obligation or penalty may not be enforced by means disproportionate to its importance; *People ex rel., v. Fire Dep't*, 5-479.

25. NECESSITY OF NOTICE. It is abhorrent to all reason to allow a forfeiture to be enforced, on an alleged default, without notice and hearing or an opportunity to be heard. *Id.*

26. INFRACTION OF BY-LAW NOT CAUSE. By the statute of Michigan, which has always limited the penalties for violations of by-laws, expulsions can not be allowed for any mere infraction of a by-law. *Id.*

27. RESOLUTION HAVING FORCE OF. Articles of incorporation provided that the company should have "the right to purchase, sell, mortgage, control and lease property, either real or personal, and to exercise all other incidental powers as shall be necessary in conducting said business." They, also, provided that the stockholders, at any annual meeting, might adopt such by-laws for the government of directors as they might deem necessary. A resolution was adopted that it was deemed not necessary to adopt by-laws, for the reason that the articles of association provided that the control and management of the corporation should be in the board of directors. Such resolution was an expression of the stockholders of an intention to leave the entire control and management of the company with the directors; *Reichwald v. Comm'l Hotel Co.*, 10-203.

28. AMENDMENT OF. It was provided, by the by-laws of a corporation, that "these by-laws and regulations may be altered or amended, by an affirmative vote, at any regular meeting of directors and the approval of the board at the next regular meeting." Another by-law provided "that the president shall make all contracts of purchase or sale, by and with the advice of the directors, or a majority of the same; but no contract shall be made involving the franchise of said road, except the same be approved by a general meeting representing a majority of the stock, after being recommended by a majority of the stockholders. Held, that although the by-law first quoted gives, to the board of directors, power to amend and alter any of the by-laws, the board had no authority, by virtue of it or otherwise, to disregard or alter the by-law last stated, which was intended to impose a limitation upon its powers; *Stevenson et al. v. Davison*, 4-203.

29. **AMENDMENT.** An amendment of a corporate constitution (which, theretofore, contained no such provision) declared that any member who should fail to pay the whole of his dues, which should then be in arrears or any indebtedness then owing to the corporation on or before a day named, should, from and after that day, cease absolutely to be such member, without any further action whatever of the corporation or its trustees, and that the secretary should drop the names of all such delinquent persons from the roll of members; Held, that such was not a by-law or regulation, but an adjudication on existing defaults, analogous to a foreclosure decree fixing a short time for payment, and clearly *ex post facto*, in that it enforces a new penalty beyond those existing at the time of the default, and void; *People, ex rel. v. Fire Dep't*, 5-479.

30. **ADDITIONAL BURDENS.** The right to levy burdens on members is governed, to great extent, by the occasion for them. *Id.*

31. **POWER TO CHANGE CONTRACTS BY SUBSEQUENT BY-LAWS.** Although a corporation may not, by by-laws subsequently made, disturb rights which it had created, or impair the obligations of its contracts, yet parties may contract with corporations, having reference to laws of future enactment, and they may agree to be bound and affected as they would be if such laws were then existing and may thereby consent that such laws may enter into and form part of their contracts, modifying or varying them; *Supr. Command.*, 10-1.

32. **INSTANCE.** Where a member of a mutual benefit insurance company accepts a certificate of insurance, conditioned upon and accepted by him, subject to "the full compliance with all the laws of the order now in force or that may hereafter be enacted," a by-law subsequently enacted providing that certificates of this class shall be forfeited if the member, whether sane or insane, shall take his own life, entered into and became a part of the contract represented by the certificates and became binding on the assured. *Id.*

33. **REPEAL OF.** A private corporation can not repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law; this, although the power is reserved, by charter, to alter, amend or repeal its by-laws; *Kent v. Quick-silver Mining Co. et al.*, 8-613.

34. **WAIVER AND REPEAL OF.** Under a charter, granted, the directory of the corporation created was empowered to make by-laws etc. for the control and management of the business and affairs of said company, its property and the mode and manner of transferring its stock. It having been the uniform course of the corporation to issue certificates of stock which did not contain a notice required by the by-law, providing for a lien on the stock, such uniform course of conduct must be regarded, at least as to all persons not members of the corporation, as making a by-law

repealing that providing for the lien and as waiving the lien as to any particular certificates issued not containing such notice ; *Bank of Holly Springs v. Pinson*, 8-69.

35. **VOTES AT ELECTIONS BY PROXY.** The charter of a benevolent society authorized the election of directors or managers at such time and place and in such manner as might be specified in its by-laws, and gave power to make by-laws not inconsistent with the constitution and laws of the state or of the United States. The constitution, passed since the charter was accepted, required the passage of a law authorizing proxy votes at elections for directors, etc., of incorporated companies. It was held, that a by-law authorizing its members to vote at all elections, etc., either in person or by proxy, was valid and not inconsistent with the constitution and laws of the state ; *People, ex rel. Chritzman et al., v. Crossley et al.*, 5-240.

36. **WHO BOUND BY.** The general rule is that the by-laws of a private corporation are binding upon none but its members and officers. Hence ; the proof not showing that the holders of certificates of deposit in a bank, had such knowledge of its by-laws as to be bound and concluded by them, they could not be affected by any disobedience of the directors and officers of the corporation to its by-laws, directing the investment of savings deposits in certain designated securities ; *Ward, rec'r, v. Johnson et al.*, 6-462.

37. **AS TO DIRECTORS WHEN ADOPTED BY CORPORATION.** The will of the stockholders, expressed in a by-law, is as binding upon directors of a corporation as a provision of the charter ; *Samuel v. Holladay*, 1-139.

38. **BINDING FORCE.** A by-law of a corporation which is not in conflict with the company's charter or otherwise illegal is binding on all stockholders and their heirs ; *State, ex rel. Martin et al., v. New Orleans, etc., R.R. Co.*, 7-208.

39. **WHEN BINDING.** Where by the charter of a corporation the corporate powers are to be exercised by a board of directors, or managers, which board is authorized to adopt by-laws for the government of the officers and affairs of the company, and, at a meeting of the stockholders, all parties in interest, whether as officers, managers, or stockholders, are present participating in the adoption of by-laws, such by-laws will be binding, notwithstanding in the resolution of adoption such persons style themselves stockholders and not directors or managers. Such by-laws, in such case, are, as matter of fact, adopted by the managers ; *People, ex rel. Wallace, v. Sterling Burial-case Manuf. Co.*, 6-376.

40. **ESTOPPEL, BY PARTICIPATION IN ADOPTION.** Where one acts in the adoption of by-laws and acquires rights under them, and third persons have acquired rights in the corporation the affairs of which they are to regulate, such actor will be estopped to deny the validity of such by-laws he himself adopted and held out to

be valid. The transferee of the shares of stock of such actor will, also, in like manner be estopped. *Id.*

41. **ESTOPPEL.** In an action, by receivers of a corporation, against a subscriber, to collect his subscription to the capital stock of the company, a book of by-laws, introduced by himself, on request of plaintiffs, and testified to be the by-laws under which the corporation acted, is admissible in evidence. As against a member of the company such by-laws are always evidence; *Frank v. Morrison et al., rec'rs*, 9-390.

42. **KNOWLEDGE OF OFFICER.** It is presumed that a corporate officer knows its by-laws, adopted prior to his appointment, and is bound by them as by a law between himself and his employer; *Hunter v. Sun M. Ins. Co.*, 5-403.

43. **NOTICE TO EMPLOYEES.** An appointee of directors of a corporation authorized to make by-laws is bound by all the provisions of the by-laws in force at the time of his appointment; *Ellis v. North Carolina Institution for the Deaf and Dumb and the Blind*, 5-591.

44. **ESTOPPEL TO DENY FORMAL ADOPTION OF.** In an action to recover unpaid instalments on a subscription to the capital stock of a corporation, one who has been made acquainted with the by-laws of the company, subscribed and held in his possession a copy of them and paid instalments on his subscription is to be held to have recognized and admitted the validity of the by-laws under which the corporation has acted; and, when, upon the faith of such admissions others have been induced to act, he will not be permitted to question the mode by which such by-laws were adopted; *Morrison et al., rec'rs, v. Dorsey*, 7-389.

45. **AS TO THIRD PERSONS.** One who, to become a member of a corporation, signs a by-law which pledges members to be liable "in their individual as well as their collective capacity," for all moneys lent to it, is not thereby personally liable to the lender for money subsequently loaned to the corporation, without other evidence that it was so loaned on the credit of the by-law than that the preamble thereof sets forth that the design of the corporation is to afford to persons desirous of saving their money the means of employing it to advantage; *Flint v. Pierce*, 1-593.

46. **AS TO THIRD PARTIES WHEN ADOPTED BY DIRECTORS.** A by-law adopted by a board of directors, providing the manner in which special meetings may be called, does not affect the validity of the acts of the board in disregard of it, especially where third persons are concerned; *Samuel v. Holladay*, 1-139.

47. **LIMIT OF THEIR BINDING FORCE.** A person who is not a member of a corporation, is not bound by the provisions of any resolve or vote it may have passed, or any contract it may have made, to which he is not a party; *Weymouth, survivor, v. Penobscot Log Driving Co.*, 7-327.

48. **NOT BINDING ON STRANGERS.** The by-laws of a corporation

are private and only accessible to the officers of the company. Strangers to the company can not be bound by the rules adopted for the government of the company; *Smith v. Smith*, 4-366.

49. **SO AS TO BANK DEPOSITORS.** In the absence of proof, that the holders of certificates of deposit have such knowledge of the by-laws of the bank as to be bound and concluded by them, they can not be affected by any disobedience of the directors and officers of the corporation to its by-laws, directing the investment of savings deposits in certain designated securities; *Ward, rec'r, v. Johnson et al.*, 6-462.

50. **JURISDICTION OF COURTS.** Courts will not review proceedings of a society, taken by authority of its articles of association, assented to by its members, for the expulsion of a member under charges presented and tried according to by-law, unless injustice has been done, which the party charged, tried and expelled could not have objected to in the society proceedings; *People, ex rel., v. St. George's Soc.*, 4-480.

51. —. Equity will not entertain a bill by a member of a private corporation, against the corporation and its officers, to restrain the expulsion of a member for a violation of its by-laws and rules. If there be any remedy it is in a court of law; *Sturges v. Board of Trade*, 6-401.

52. **AS BAR TO ACTION.** By-laws of a mutual benefit association provided for the final adjudication of all claims for relief by tribunals within the society, with expulsion of a member who should pursue his claim in the courts. Proceedings had before such tribunals bar recovery in court; *Osceola Tribe v. Schmidt*, 9-387.

53. **AS TO LIEN ON BANK STOCK.** A by-law giving a bank a lien on the stock of its debtors is not "a regulation of the business of the bank or a regulation for the conduct of its affairs," within the meaning of the national banking act of 1864, and therefore not such a regulation as, under the said act, national banks have a right to make; *Bullard v. Bank*, 3-74, note 1.

54. —. A banking association organized under the national banking act of June, 1864, can not, even by provisions framed with a direct view to that effect, and inserted in its articles of association and by direct by-laws, acquire a lien on its own stock held by persons who are its debtors. *Id.*

55. **IN RESTRAINT OF TRADE.** M. procured a loan from plaintiff, upon stock in the defendant company, standing in his name, transferring the stock to a trustee to secure the loan. Default being made in repayment, the stock was sold under a power of sale contained in the deed of transfer, and plaintiff became the purchaser. Upon demand made after this sale, and an offer to pay all assessments due, defendant refused to certify the transfer of stock by new certificate, alleging that the stock was held, at the time the plaintiff took it, for debts due from M., and that it had been forfeited under a by-law of the corporation, ordained

under power in the charter, authorizing the transfer of stock in such manner as the company might prescribe. The by-law was in effect that stock could only be transferred on the books of the company. Held, that the right of alienation is an incident of property, a by-law prohibiting or restricting the exercise of the right is in restraint of trade, against public policy and void. The company might, as a cumulative mode of transfer, require its registration, but whether entered or not, the title would pass as between the former owner and the purchaser; *Moore v. Bk. of Commerce*, 4-519.

56. **TRANSFER OF STOCK.** A by-law adopted, while section 30 of the currency act of 1863 was in force, providing for the transfer of stock, "subject to the provisions and restrictions" of said act, did not operate to continue the repealed section in force; *First Nat. Bk. of South Bend v. Lanier*, 3-74.

57. **COMPLIANCE WITH BY-LAWS.** By-law of a corporation providing that transfers of stock shall only be made on surrender and cancellation of the original certificate is binding on stockholders and their heirs. It follows, that before the latter can lawfully demand a transfer to them of their ancestor's stock, or the payment of accrued dividends, they must comply with the law governing them; *State, ex rel. v. N. Orl., etc. R.R. Co.*, 7-208.

58. **PROHIBITING TRANSFERS.** A by-law prohibiting the transfer of stock where the stockholder is in arrears in answering calls on such stock and, also, when he shall be otherwise indebted to the bank, is reasonable and not inconsistent with law; *Kahn v. Bank of St. Jo.*, 8-232.

59. —. A by-law which should prohibit the transfer of stock merely because it is not fully paid up, when all calls made on it have been paid, would be unreasonable. *Id.*

60. —. By-laws of a corporation provided that there should be no transfer of shares of stock which were not paid in full or by one who was indebted to the corporation until transferee should satisfactorily secure the indebtedness of his transferor and that, then, all evidences of debt, or liability, should be surrendered to transferor. The lien of the corporation must prevail over the claim of an equitable assignee of the original owner or transferor; *Planters etc. Ins. Co. v. Selma Sav. Bk.*, 6-171.

61. —. A national bank has power to make a by-law prohibiting the transfer of shares of its capital stock while the holder is indebted to the bank and that such stock shall be pledged and liable for the payment of any debt to the bank, owing by the shareholder; *Lockwood v. Mech. Nat. Bk.*, 4-140; but, see *Nat. Bk. v. Lanier*, 3-74.

62. —. A by-law, "that shares shall be transferable by indorsement, in writing, and subscribed, by the holder, in presence of the cashier, or two other witnesses," etc., is lawful and salutary; *Dane et al. v. Young et al.*, 4-425.

63. **PROHIBITING TRANSFERS.** In the absence of any by-law as to the sale of shares of stock, a regulation, as to such transfer, incorporated into the certificate of stock and established by long usage, may well be recognized as the law of the matter; *State, ex rel., v. M'Iver*, 4-160.

64. **CONSTRUED.** A provision of the by-laws of a corporation, that its "shares shall be transferable by indorsement in writing, and subscribed by the holder in the presence of the cashier, or two other witnesses," requires that the cashier, or two other witnesses, shall, in writing, attest the signature in order to render the transfer valid between the parties; *Dane et al. v. Young et al.*, 4-425.

65. —. A by-law of a banking company, authorized to receive deposits, either as savings or in trust, that deposits of one dollar and upward may be received, from any person, etc., to be held in trust for them, does not show that all deposits were to be held in trust — but, the reverse. The charter conferring power, it plainly shows that trust funds, deposits and savings were regarded as separate and distinct; *Ward, rec'r, v. Johnson*, 6-462.

66. —. A by-law of a banking corporation to the effect that deposits may be received and paid in gold or silver coin, or in such funds as may be current in the city where the bank is located, or as may be arranged by special agreement, made in writing by the president, etc., clearly recognizes that the deposits become debts of the bank and authorizes the officers named to stipulate for payment, without reference to the securities in which they are deposited. *Id.*

67. —. A by-law authorizing a savings deposit to be withdrawn after a certain notice given, without regard to the condition of the investment, at the time, indicates that the depositor has no trust in his investment. *Id.*

68. —. A by-law of a benevolent society which makes the payment of a sum in case of death, contingent on the orderly conduct of the member, is not an expulsion, or a total denial of benefits; but the loss of benefits, *pro hac vice*. The membership and the title to benefits remain and attach to every case of death not resulting from prohibited vices; *St. Mary's Ben. Soc. v. Burford's adm.*, 4-125.

69. —. A by-law of a chamber of commerce provided for the suspension, or expulsion, of any member for "failing to comply promptly with the terms of any contract, either verbal or written." This is neither illegal, unreasonable, unjust or wrong, albeit the contract repudiated be unwritten and within the statute of frauds. Such by-law has reference to contracts not made during a session of 'change of or upon the floor of the chamber, at least, when such contracts are entered into between members of the association. *Dickenson v. Chamber of Com.*, 4-229.

70. —. A by-law which provides that a member who shall wilfully violate the constitution and by-laws, or be guilty of

fraudulent breach of contract, or of any proceeding inconsistent with the just and equitable principles of trade, or other misconduct, is not infringed by a refusal to pay an award, made by a committee, when the party against whom the award is made is and has been respectfully protesting against the jurisdiction of the arbitrators and demanding an appeal. A suspension in such case is not warranted; *Savan. Cotton Exch. v. State, etc.*, 6-342.

71. —. By-laws, requiring that certificates of stock shall be issued under the corporate seal and signed by the president and cashier. In the absence of any further provision, no other or different form of certificate is required in the case of stock owned by the officers named; *Titus v. Great W. T. R.*, 5-563.

72. CEMETERY COMPANY. Authority by charter to make rules and regulations for the government of lot owners, gives authority to make such rules as they may deem necessary; but, the same must be reasonable and uniform as to all lot owners; *Rosehill Cem. Co. v. Hopkinson*, 10-269.

See BENEFIT SOCIETY; BENEVOLENT ASSOCIATION; TELEGRAPH COMPANIES.

C.

CANAL COMPANY.

1. CANAL IS A PUBLIC HIGHWAY. A canal is a public highway which all persons, upon complying with all lawful requirements, may navigate and use, at their pleasure, on all days except Sunday, and on Sunday in case of necessity; *M'Arthur v. Green Bay & Mississippi Canal Co.*, 5-625.

2. OBLIGATION; LIABILITY. It is the legal duty of a canal company to use all ordinary and reasonable means and appliances to guard against the breaking away of the embankment of its canal. Failing to do so, if a break therein occur which results in an injury to the person or property of others (the latter being free from contributory negligence) the defendant is liable to respond in damages for such injury. *Id.*

CAPACITY TO SUE.

1. HOW ATTACKED. There can be no attack on the character in which a corporate plaintiff sues, raising the question of due organization, save, only, by verified plea, denying the character assumed; *Selma etc. R.R. Co. v. Anderson*, 8-27.

CAPITAL STOCK; see STOCK AND STOCKHOLDER..

CARRIER; see COMMON CARRIER.

CASHIER OF BANK; see BANK AND BANKING; NATIONAL BANK.

CEMETERY COMPANY.

1. **LEGISLATIVE CONTROL.** A cemetery is not a nuisance, *per se*, and the subject of absolute prohibition by legislative action. Burial places are indispensable. They concern the public health and, if they were not prepared by private enterprise, it would be the duty of the state to act in the premises. The legislature has the right to pass laws to regulate interments, to prevent injury to the health of the community, notwithstanding the burial place may be owned by a corporation, which exercises franchises conferred by the state. In this regard it is within the legislative control; *Town of Lake View v. Rose Hill Cemetery Co.*, 5-252.

2. —. Where a cemetery company is chartered, with power to acquire lands for burial purpose, not exceeding a specified quantity, and it acquires such lands and makes expenditures in preparing and beautifying the same, a legislative enactment prohibiting the company from using any of its lands, outside its present inclosure, for the burial of the dead, without regard to the manner of the exercise of the franchise, is unconstitutional and void, as impairing the obligation of the contract contained in its charter. *Id.*

3. **PRIVATE CORPORATION.** The use of lands for the purposes of a cemetery association, incorporated under the general incorporation law of New York (Laws of 1847, ch. 133, as amended by laws of 1852, ch. 280, and laws of 1874, ch. 245), is private, not public; *In re petition of Deansville Cemetery Assoc.*, 8-470.

4. **NOT SUBJECT TO SALE, WHEN.** A cemetery, or graveyard, can not be subjected to sale, to pay for improvements on adjacent streets; *Louisville v. Nevin, etc.*, 5-401.

5. **RULES MUST BE UNIFORM.** Where the charter incorporating a cemetery company provides for a board of managers who are authorized to make rules and regulations for the government of lot owners, they may make such rules and regulations as they deem necessary, but the same must be reasonable and uniform as to all owners of lots in the cemetery. The managers have no right to make a rule which will confer a right upon one owner and deny the same right to another lot owner; *Rosehill Cem. Co. v. Hopkinson*, 10-269.

6. —. Such company, being a quasi public corporation, is bound to exercise its rights and privileges fairly and impartially, and if it undertakes to act arbitrarily or transcend its powers to the injury of a lot owner, such action may be reviewed by the courts. *Id.*

7. —. If the board of managers of a public cemetery company, incorporated by law, have authority to prevent a lot owner from erecting a vault upon his lot, that power must be exercised by the adoption of a general rule applicable to every lot owner. *Id.*

8. **RULES MUST BE UNIFORM.** The rule adopted by the board of managers that "no vault shall be built entirely or partially above ground without permission of the company," taken in connection with another rule that "no vault shall be constructed until the designs and plans shall have been submitted and approved by the board of managers," is not to be regarded as prohibiting the erection of a vault; and in the absence of a rule prohibiting such erection as to all persons, the board of managers have no power to establish a rule governing a particular case. *Id.*

CERTIFICATE OF DEPOSIT.

1. **ITS NATURE.** A certificate of deposit is a written instrument, ascertaining the holder's demand, upon which, in Alabama, a judgment by default may be entered up by the clerk without the intervention of a jury; *Talladega Ins. Co. v. Woodward*, 3-116.

2. **ISSUE; POWER.** A corporation authorized to receive deposits, on trust, but prohibited to "make or issue any bills, bonds, notes or other securities to circulate, in the community, as money," may issue certificates of deposit; *Talladega Ins. Co. v. Landers*, 3-102.

CHAMBER OF COMMERCE; see **BOARD OF TRADE.**

CHANCERY; see **EQUITY.**

CHANGE OF NAME; see **CORPORATE NAME.**

CHANGE OF FORUM; see **REMOVAL OF CAUSES; VENUE.**

CHARITABLE ORGANIZATION.

1. **WHAT IS.** A corporation, the object of which is to provide a general hospital for sick and insane persons, which has no capital stock nor any provision for making dividends or profits; deriving its funds mainly from public and private charity and holding these funds for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without expectation, or right, on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution; *M'Donald v. Mass. General Hospital*, 7-453.

2. —. The facts that a corporation, established for the maintenance of a public hospital, by its rules, requires of its patients payment for their board, according to their circumstances and the accommodations they receive; that no person has, individually, a right to demand admission; and, that the trustees of the hospital, by their agents, determine who shall be received, do not render it the less a public charity. *Id.*

3. **WHAT MAY BE.** The fact that a corporation established for and devoting its funds (which are mainly acquired by voluntary

donation) to the support of poor and old women, requires an entrance fee from each applicant for admission, does not deprive it of the character of a charitable corporation; *Gooch v. Assoc. for Relief of Aged Indigent Females*, 4-445.

4. **WHEN NOT PURELY PUBLIC CHARITIES.** A charitable or benevolent association which extends relief only to its sick and needy members and the widows and orphans of its deceased members, is not "an institution of purely public charity," so that its moneys held and invested for the purposes mentioned are exempt from taxation; *Morning Star Lodge, No. 26, I. O. O. F. v. Hay-slip, treas. etc.*, 4-58.

5. **DISTINGUISHED.** A corporation for the purpose of receiving and investing, in public stock or substantial security on real estate such sums of money as may be saved from the earnings of tradesmen, mechanics, laborers, servants and others, and of affording to industrious persons the advantages of security and interest, authorized by charter to receive, take, hold, possess, enjoy and retain lands, rents, etc., stock, goods, chattels and effects of what kind, nature or quality soever, etc., by gift, grant, demise, bargain and sale, devise, bequest, testament, legacy, loan, deposit or advance, or by any other mode of conveyance, with the right to apply the same or the income thereof to the uses, ends and purposes of the association, and whose president and managers are prohibited to receive any emolument for their services, is a business corporation and not a charitable one subject to the laws limiting property of charitable institutions. The words "gift, devise, bequest, legacy" in the charter denote only means to effectuate its purposes, and do not indicate the purpose or design of the corporation, and a power given to "improve and augment" the property of the society is a power to furnish adequate security for re-payment of depositors; *West's App'l*, 4-111.

6. **MEASURE OF LIABILITY.** A corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence, nor for the unauthorized assumption of other persons — in this cause the house pupil — not selected for the office of surgeon, to act as such; *M'Donald v. Mass. Gen'l Hospital*, 7-453.

7. **ENFORCEMENT OF ESCHEAT.** Proceedings to escheat property held by a literary, charitable, religious or benevolent society or corporation, in excess of the limit prescribed by the statutes of Pennsylvania, must be by quo warranto, as in case of the usurpation of a corporate franchise; *West's App'l*, 4-111.

CHARTER.

1. **EQUIVALENT OF.** A general statute authorizing the incorporation of companies and articles of incorporation entered into under such law are considered in the nature of a grant from

the state, and, taken together, constitute the charter; *Livesey v. Omaha Hotel Co.*, 8-312.

2. ARTICLES OF INCORPORATION. The articles of an association, formed under the general laws of the state, are its charter and, subject to the constitution and general laws of the state, its fundamental and organic law. They fix the rights of the stockholders, and are in the nature of a fundamental contract, in form, between the corporators and, in practical effect, between the association and its stockholders, which neither party is at liberty to violate. This can no more be done by by-laws and resolutions, adopted by the stockholders, than in any other way; the authority to pass by-laws being an authority to pass such only as are consistent with the articles of incorporation — rules and regulations as to the manner in which the corporate powers shall be exercised; *Bergman v. St. Paul Mut. Building Ass'n*, 9-492.

3. POWER TO GRANT LIMITED. The legislature has no power to confer upon any corporation the right to manufacture or sell any article for ever, notwithstanding and in spite of any exigencies which may occur, in the morals or health of community, requiring such manufacture to cease; *Beer Co. v. Massachusetts*, 6-43.

4. DISTINCTIONS DRAWN. Under a charter which is a mere proposition for the organization of a corporation and which requires certain acts to be performed precedent to the existence of the corporation, it can not come into existence until the conditions have been complied with. Where, on the other hand, the charter itself creates a corporation, provided it be accepted by the corporators, the corporation is in existence, for all the purposes of its creation, from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication; *Perkins v. Sanders et al.*, 8-53.

5. NATURE OF. Every charter of a private corporation is a contract, (1) between the state and the corporation, to which each is solemnly bound; the state that it will not impair the obligation, and the corporation that it will perform the objects of its incorporation and keep within the powers granted to it; (2) between stockholders, who are bound to consent to the management of the affairs of the corporation by the majority and by the by-laws which that majority makes; (3) the whole agree with each other, that they will apply the funds of the company to the objects and purposes of the charter and not otherwise; *Central R.R. Co. et al. v. Collins et al.*, 3-224.

6. —. While the charter of a private corporation is a law, it is, also, something more than a law, in that it contains stipulations which are terms of compact between the state, as the one party, and the corporation, as the other, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as would

be contracts between two private persons; *Flint & Fentonville Plankroad Co. v. Woodhull*, 4-449.

7. INVIOABILITY OF. Charters of private corporations are regarded as executed contracts between the state and the corporators, and the rule is well settled that the legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, can not repeal, impair or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared; *Miller v. State of New York*, 4-256.

8. —. Exemption from liability to any greater tax than one-half of one per centum of its net annual income having been conferred by its charter upon one company, of two which consolidated, it is not in the power of the legislature to impose an increased tax after consolidation; *Central R.R. & Banking Co. v. Georgia*, 5-126.

9. —. When the trustees of a private corporation accept the terms of the act of incorporation and the corporation is organized thereunder, the franchises and privileges, inclusive of a lottery privilege (not prohibited by constitution) with which the corporation is endowed by the law making power, become and are matters of contract, and vested rights, which can not be abridged, impaired or annulled by subsequent legislation; *Kellum v. State*, 7-93.

10. —. A charter is a contract. The state has, as an incident of sovereignty, the right to contract. The power to contract is all embracing and includes all subjects in which the interests of the state are involved, unless when restricted by constitutional prohibition. The contracts of the state are as binding as those of individuals; *State v. Maine Cent. R.R. Co.*, 7-284.

11. CONTRACT. A legislative charter granted and accepted constitutes a charter between the state and the corporation. The obligation of such contract can not be impaired by subsequent constitutional legislation; *Scotland County v. Missouri, Iowa & Nebraska Ry. Co.*, 8-159.

12. —. That the grant of a charter by the state, to a private corporation, creates a contract between the state and the corporation, is no longer an open question; *Ward, rec'r, v. Farwell et al.*, 6-490.

13. CONTRACT WITH STATE. A charter granted to a corporation is a contract between the state and the company, and the corporation may exercise its chartered rights until the expiration of the term for which it is granted, unless, by some act violative of the obligations assumed by its organization, it shall forfeit the privileges and franchises granted. Under the constitution of the United States the general assembly has no power to impair the obligation of these contracts; *Ruggles v. People of State of Illinois*, 6-428.

14. **SUBSEQUENT LEGISLATION.** A charter granted to a corporation before the enactment of a state constitution or a general law imposing new liabilities upon stockholders, is not affected by such legislation; *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co. et al.*, 6-481.

15. **CORPORATION UNDER SPECIAL CHARTER.** A corporation which is created by special act of the legislature is not placed under the provisions of a general incorporation law; *Wincock et al. v. Turpin*, 6-473.

16. **WHEN A CONTRACT.** To create an inviolable contract with the commonwealth arising out of the passage and acceptance of a charter, it must, by virtue of the act, invest the corporation with an absolute right of property, or confer such authority as vests the corporation with such interests as are of appreciable value; *Chattaroi R.R. Co. v. Kinnear*, 10-445.

17. **EFFECT OF PRIOR GENERAL STATUTE.** A general statute providing that every act of incorporation passed after a day stated shall be subject to amendment, alteration or repeal, at the pleasure of the legislature, forms a part of the contract between the corporation and state; *Thornton v. Marginal Freight Ry. Co. et al.*, 7-467.

18. —. A general incorporation law, passed August 24, 1855, limited the existence of every corporation to the period expressed in its charter, or, if no period of limitation was expressed in its charter, then said general incorporation law limited its existence to ten years. On the 30th day of August, 1855 — six days later — an act was passed incorporating a company. This act did not limit the existence of the company, as a corporation, to any particular period of time. The corporation organized October 13, 1855. The corporation was created, to exist as such, for the period of ten years and no longer; *Krutz v. Paola Town Co.*, 7-124.

19. —. A general incorporation law provided for the alteration, suspension, or repeal, by any subsequent legislature, of any charter granted to any corporation after said general law was passed. It, also, provided for closing up the affairs of any corporation upon its dissolution. Six days after this general law was passed a corporation was created. Five years thereafter the general incorporation law and the special act of incorporation referred to were repealed. If such repeal did not have the effect to abolish the corporation as such, it certainly did not have the effect to extend its corporate existence indefinitely, or beyond the date it would expire by limitation of the same general law in force when it was created. *Id.*

20. **CHANGE BY LEGISLATURE.** The legislature has the power to enact any subsequent or amendatory law which regulates the remedy for enforcing corporate rights and privileges, provided

it does not impair the obligations of the contract or interfere with vested rights; *Chattaroi R.R. Co. v. Kinnear*, 10-445.

21. SPECIAL. A charter granted by the legislature is not affected by subsequent change in the state constitution prohibiting the granting of charters in that manner; *City of Atlanta v. Gate City Gas Light Co.*, 10-150.

22. GENERAL AND SPECIAL. The general law of Iowa providing for the incorporation of towns and cities has no application to towns existing under special charters when it was enacted; and the election of officers pursuant to the general law, by a town organized by special charter, without more, does not amount to an abandonment of the special charter, and an organization under the act; *Town of Decorah v. Bulis*, 2-278.

23. CONSTITUTES LEGAL ESTATE. Corporate franchises granted to private corporations partake of the nature of legal estates; *Miller v. State of New York*, 4-256.

24. POWER TO DISPOSE OF. It seems to be well settled, by judicial decisions, that a corporation can, when authorized by law so to do, transfer, sell or convey its charter or franchise to be a corporation, and thus vest it in others; *State of Ohio, ex rel., v. Sherman et al.*, 4-28.

25. EFFECT OF TRANSFER OF. When a corporation transfers or conveys its charter, being thereto authorized by law, the legal effect of such transfer is a surrender or abandonment of the old charter by the corporators and a grant de novo of a similar charter to the transferees or purchasers. This charter granted de novo is, however, subject to all the requirements and limitation of the constitution in force at the time of its re-issue or new grant. *Id.*

26. LEGAL CONSIDERATION MOVING TO GRANT. There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract and no other is required to support it; *Home of the Friendless v. Rouse*, 3-7.

27. ACCEPTANCE; GENERAL RULE. As a general rule, when a charter is granted, whether it be one of creation or an amendment to a pre existing corporation, it must either be accepted or rejected as offered and without condition; and, in accepting the privileges conferred, the grantees will be required to perform the conditions imposed; *Lyons v. Orange, Alexandria & Manassas R.R. Co.*, 3-371.

28. NECESSITY OF ACCEPTANCE. Private corporations are created by charter or acts of incorporation from the government, and these are in the nature of contracts. Therefore, in order to complete the creation of such corporations, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it

must be accepted. The government can not enforce the acceptance of a charter, upon a private corporation, without its consent; *Yeaton v. Bank of the Old Dominion*, 4-211.

29. ACCEPTANCE OF. When a charter is granted as a privilege, and not for the purpose of imposing an obligation, it has no binding effect until accepted by those for whom it was intended. When accepted it becomes of binding force and must be taken with all its burdens as well as its privileges. It can not be accepted in part; but must be taken as a whole; *Weymouth v. Penobscot L. D. Co.*, 7-327.

30. —. It does not lie in the mouth of a corporation which has accepted a charter to complain that the granting of the privileges granted is beyond the power of the legislature which made the grant. *Id.*

31. —; CONDITIONS PRECEDENT. The general rule, in regard to the acceptance of a charter or charter amendments, while applicable to subsequent conditions, to be performed after the organization of the company, does not apply to conditions precedent, upon the strict performance of which the very existence and exercise of the powers on the part of the corporation depend. In such cases the organic life of the corporation depends upon a strict compliance with the conditions imposed, and, until this is done, there can be no such thing as an acceptance of the charter; *Lyons v. Orange etc. Co.*, 3-371.

32. QUALIFIED ACCEPTANCE INSUFFICIENT. A qualified or partial acceptance of an act of the legislature, granting new franchises to an existing corporation upon conditions specified, will not be recognized. The corporation must accept it as offered. *Id.*

33. ACCEPTANCE IMPLIED. An act of incorporation which, after naming certain persons, declares that they "and such others as may thereafter become associated with them for that purpose, and their successors, are hereby declared and created a body politic and corporate," constitutes the parties named a corporation immediately on its passage, there being no conditions expressed to be complied with before they can become a body corporate; *Talladega Ins. Co. v. Landers*, 3-102.

34. ACCEPTANCE PRESUMED. As a general proposition it is true that the charter of a corporation must be accepted, but in cases of private corporations, created for individual benefit, the presumption is they are created at the instance and on the request of the parties to be benefited thereby, and, consequently, are accepted by them. If, therefore, they are found exercising the privileges granted, it will be almost conclusive evidence of the fact of acceptance. *Id.*

35. —. If a charter is granted after having been applied for, acceptance will be presumed from such previous application; *City of Atlanta v. Gate City Gas Light Co.*, 10-150.

36. COUPLED WITH CONDITIONS. If the stockholders of a corporation accept a charter, coupled with a condition and privilege to be exercised provided such stockholders have complied with certain prerequisites and at a time fixed, the company will have no right to exercise the privilege without first complying with such prerequisites and at the time designated; *Grumbine v. State of Maryland*, 9-424.

37. INSTANCE. The charter of a turnpike company fixed the rate of tolls which might be collected, the intention being to restrict the clear profits within ten per cent. The company was required, once a year, at least, to render to an officer named, a detailed statement of its receipts and disbursements, and such officer was authorized to lower or increase the rates of tolls, and if at the end of two years after the completion of the road it appeared that the average profits for those two years would not yield a dividend of ten per cent, then the company had the right to increase the tolls. In the absence of such report of receipts and expenditures, the corporation was powerless to increase such tolls, nor could they increase them at any other period of time than at the end of the two years from the completion of the road. *Id.*

38. CONDITIONS; ACCEPTANCE. When the charter of an incorporated company provides that it shall be liable for damages to persons or property caused by the exercise of its powers, the acceptance of such charter by the corporation renders it liable for such injuries; *Alton & Upper Alton Horse Ry. & Carrying Co. v. Deitz*, 1-439.

39. IMPLIED CONDITION. Fidelity to the state, on the part of corporators, is embraced in every charter; no charter involves the imperative obligation of permitting a public enemy, alien or domestic, to remain in the management of corporations whose operations may be made to embarrass us or aid the public enemy. The duty of loyalty is antecedent, perpetual, paramount, and in granting a charter, the state can make no engagement to dispense with that duty. It enters into the contract and is a fundamental condition of the grant; *State, ex rel. Pittmann et al., v. Adams et al.*, 3-515.

40. IMPLIED AGREEMENT. A corporation receives its charter, and donations under it, with the implied agreement that it will perform, in good faith, the duties imposed by the charter; *Attorney Gen. v. Illinois Agric. College*, 6-393.

41. IMPLIED CONDITIONS. There are annexed to charters, by implication of law, terms and conditions which are as much parts of the contract as those which are expressly stated. Wherefore, the corporators of every corporation are held, impliedly, to agree to take the privileges and immunities conferred by the charter, subject to the right of the state to reclaim them for any manifest misuser of them; *Ward, rec'r, v. Farwell et al.*, 6-490.

42. IMPLIED CONDITIONS. Every private corporation, in accepting its charter, impliedly undertakes and agrees, upon condition of forfeiture, that it will exercise the rights and privileges conferred upon it in furtherance of the objects and purposes of its creation, and not otherwise, and that it will so manage and conduct its affairs that it shall not become dangerous or hazardous to the safety or well being of the state or community in and with which it transacts its business. *Id.*

43. —; INJURIES. The acceptance of a charter and the construction of a railroad thereunder is upon the implied condition that the work shall be so constructed and operated as not to injure others; *Alton etc. Ry. etc. Co. v. Deitz*, 1-439.

44. IMPLIED CONDITIONS. There is an implied undertaking, on the part of every corporation, to render to the public, so far as it reasonably can, that service for which it was created, and not voluntarily render itself unable to perform it; *Kenton County Court v. Bank Lick Turnpike Co.*, 5-395.

45. —. It is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they are incorporated; *State of Nebraska, ex rel., v. Council Bluffs & Neb. Ferry Co.*, 8-336.

46. LEGISLATIVE CONTROL. An enactment which creates and imposes upon the stockholders of a bank becoming thereafter organized, though not for the purpose of issuing notes to circulate as currency, an individual liability for the corporate debts of the bank, is not repellant to the constitution; *Allen v. Walsh*, 7-634.

47. SUPERVISION OF CHARTERS. In the state of Wisconsin the legislature retains control over charters, and has the power to take away any exclusive privilege or franchise which it may, improvidently, have granted; *State of Wisconsin v. Milwaukee Gas Light Co.*, 4-234.

48. LEGISLATIVE CONTROL OF. Limited in the charter of a corporation that it may be altered, amended or repealed by the legislature, and the power thus reserved is in terms absolute. It is not an unlimited power. Like all legislative powers it is subject to this important limitation, viz.; it shall not be so exercised as to impair the obligation of a contract, or to destroy vested rights; *New Haven & Derby R.R. Co. v. Chapman*; *Same v. Barker*, 4-320.

49. —. A general statute of Massachusetts provides that every act of incorporation, passed since March 11, 1831, shall, "at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature." This, at least, reserves the authority to make any alteration or amendment, in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights; *Comm'rs etc. v. Holyoke Water P. Co.*, 3-445.

50. **LEGISLATIVE CONTROL OF.** Where there is a general law of the state reserving, to the legislature, the power to alter, amend, or withdraw any privilege granted by a charter, this reservation qualifies the grant; a subsequent exercise of the reserved power is not within the prohibition of the federal constitution, as an act impairing the obligation of contracts; *State v. Maine Central R.R. Co.*, 7-284.

51. **AMENDMENT UNDER RESERVED POWER.** Where, in the charter of a corporation, the legislature expressly reserved the power to alter, repeal or annul the charter at pleasure, the question whether a proposed amendment of the charter is wise and consistent with the interests of the public and the prosperity of the company, is one which, by the charter, is made to depend upon the wisdom and discretion of the legislature; it is not a question to be determined by the courts. *American Coal Co. v. Consolidation Coal Co. et al.*, 7-372.

52. —. The reservation, by the legislature, in a charter, of the right to alter, repeal or annul such charter at pleasure is a part of the contract. All parties dealing with the company acquire and hold their rights subject to the reserved power of the legislature. It is not for courts to presume that the power reserved will be exercised by the legislature, arbitrarily or unjustly. *Id.*

53. **EFFECT OF GENERAL LEGISLATION UPON.** The general purpose of the general incorporation laws of 1845 and 1855 and the general railroad corporation law of 1855 of the state of Missouri, was to confer certain designated powers and privileges and impose certain duties and liabilities upon corporations, formed under such laws, in the absence of stipulations or provisions, inconsistent with these, contained in special charters subsequently granted. Where such inconsistencies occur in the subsequent legislation, the previous restrictions, contained in the general statutes, must be understood to have been removed; *Scotland County v. Missouri, Iowa & Nebraska Ry. Co.*, 8-159.

54. —. Where there is a general law concerning corporations, in existence and in force at the time of the granting of a charter creating a corporate body, such parts of the general statute as are not excluded by the charter enter into and form part of it; *Preston v. Missouri & Pennsylvania Lead Co.*, 8-86.

55. **MODIFICATION OF.** The power of the legislature to repeal, alter or modify the charter of any bank, at its pleasure, must be held to be limited to this extent; it may repeal the charter of any bank, but it can not compel a bank to accept an amendment or modification of its charter, nor is any such amendment or modification of its charter binding upon the bank without its acceptance; *Yeaton v. Bank of the Old Dominion*, 4-211.

56. **ABROGATION OF PRIVILEGE.** A state may, in the exercise of its police power and in the interest of good morals, take away

and abrogate a lottery privilege previously granted, without impairing the obligation of a contract, within the meaning of the constitution of the United States; *State v. Woodward*, **9**-285.

57. **INSTANCE.** The lottery privilege conferred on the Vincennes University by the territorial legislature of 1807, was taken away by section 8 of article 15 of the state constitution and the statute (Rev. St., 1881, § 2077), makes the sale of lottery tickets a crime. *Id.*

58. **AMENDMENT.** The right to amend a charter, reserved to the general assembly, does not confer upon the general assembly the power to take away from the corporators the control of the corporate property; *Orr v. Bracken County*, **10**-449.

59. —. Neither can it change the object of the incorporation by taking away from the corporators the right to select officers under their charter, and place it in the hands of those whose stock, by reason of the increased power of the amendment, are enabled to control the corporation. *Id.*

60. —. The court finds that the amendment was not asked for by a majority of the stockholders, and was not accepted by them. *Id.*

61. —. It is the general rule that an amendment to the charter of a corporation must be accepted by the corporators before it will become binding; *Mower v. Staples*, **10**-677.

62. —. No fundamental change in the charter of a corporation which vitally and radically affects fixed and established rights, can be forced, by the acts of the majority, upon an unwilling stockholder; *Hoey, liquidator etc. v. Henderson et al.*, **7**-253.

63. **AMENDMENT AS AFFECTING STOCKHOLDER'S LIABILITY.** Where a stockholder, in a corporation which possesses banking powers, is conversant with its affairs and does not object to the amendment of its charter and consequent changes in the business of the company, and participates in the benefits derived therefrom, he can not avoid a personal liability, to creditors, by reason of such amendment, but will be held to have acquiesced therein; *Dows v. Naper*, **6**-424.

64. **AMENDMENT; NEW TERMS.** Where the right to engraft upon a charter new terms, or provisions, has not been reserved in the grant, it is not within the power of the legislature, after the acceptance of the charter, to amend it, without the concurrence and assent of the corporation; *Ward, rec'r, v. Farwell et al.*, **6**-490.

65. **RESERVED POWER TO AMEND.** The reservation, in the charter of a private corporation, of the right to repeal or amend it does not necessarily extend to every subsequent amendment. The particular language used is not to be extended beyond its proper meaning, by implication; *New Jersey v. Yard*, **6**-17.

66. **AMENDMENT BY GENERAL LAW.** A state statute which declares all corporate charters granted after its passage may be

altered, amended or repealed by the legislature, does not necessarily apply to supplements to existing charters, enacted subsequent to the statute. *Id.*

67. **REPEAL OR AMENDMENT UNDER PRIOR STATUTE.** The right to amend or repeal legislative grants, etc., reserved in a general statute is but the expression of the purpose of the legislature of that session or term, and it can not bind any succeeding legislature which may choose to make a grant or contract not subject to be altered or repealed; wherefore, if a subsequent legislature shall grant or amend a charter declaring, in the act, that it shall not be subject to alteration and repeal, the former act is of no force in that case. *Id.*

68. **AMENDMENT UNDER SUPPLEMENT.** A provision in an act supplementary to an act of incorporation which provides "this supplement, and the charter to which it is a supplement, may be altered or amended by the legislature," does not apply to a contract made, with the corporation, by a subsequent supplementary act. *Id.*

69. **AMENDMENT OF.** A general statute existing subjecting all railroad charters granted, since a day fixed, to alteration, amendment or repeal at the pleasure of the legislature, includes the right to take away some of the powers granted to such a corporation as well as to add new powers, without which improvements of the greatest importance would be ultra vires; Mayor and aldermen of Worcester et al. v. Norwich & Worcester R.R. Co. et al., 4-438.

70. —. Where, by a general statute, there is power reserved to the legislature to alter, amend or repeal the charter of corporations at pleasure, the right of amendment being absolute, it is not dependent in its exercise upon the consent of the corporation. *Id.*

71. **POWER TO AMEND.** Where a special charter of a company contained a provision that it might be altered, amended or repealed, at any time, by the legislature, there can be no doubt of the power of the legislature to so amend such charter as to impose new duties and liabilities upon the stockholders; even such as they were exempt from by the provisions of the special charter; Butler v. Walker, 5-333.

72. **AMENDMENT.** Where in the charter granted to a corporation, or by the constitution or some general law of the state, applicable to a charter subsequently granted, the power is reserved to alter, amend or repeal the franchise or privilege granted, such reservation qualifies the grant, and a subsequent exercise of the reserved power is not an act within the prohibition of the federal constitution as impairing the obligation of a contract; West Wisconsin Ry. Co. v. Board of Supervisors of Trempealeau County, 5-641.

73. —. The power reserved, to repeal, alter or amend a

charter, authorizes the legislature to destroy the charter. If the legislature should undertake to make a legitimate alteration or amendment, the corporation has the power to reject or accept it. If it does not accept the modification or amendment proposed, the corporation must discontinue its operations as a corporate body; *Yeaton v. Bk. of Old Dominion*, 4-211.

74. AMENDMENT. Some amendments, or laws, affecting corporations, are binding with or without their assent. Others bind the corporation and every member thereof, if assented to by a majority of the stockholders. Others are not binding upon non consenting members, although assented to by the majority. All general laws and mere matters of police regulation are embraced in the first class. Additional powers, duties and privileges, which do not change essentially the nature and character of the corporation, or the purpose for which it was created, and have for their object the promotion of the enterprise originally contemplated, fall within the second class. All amendments which work a radical change in the nature and character of a corporation, or the purpose for which it was created, are within the third class; *New Haven & Derby R.R. Co. v. Chapman*; *Same v. Barker*, 4-320.

75. POWER TO AMEND. Power to legislate, founded upon such a reservation, while it can not be exercised to take away or destroy rights acquired by virtue of the charter, and which, by the legitimate use of the powers granted, have become vested in the corporation, may be exercised to almost any extent to carry into effect the original purpose of the grant, or to secure the due administration of the corporate affairs so as to protect the rights of stockholders and creditors and for the proper disposition of the assets; *Miller v. State of New York*, 4-256.

76. AMENDMENT. An amendment of the charter of a corporation, conferring additional powers and privileges upon it, it being an existing corporation, upon certain terms and conditions, can not operate or have any binding effect unless accepted; *Lyons v. Orange, Alexandria & Manassas R.R. Co.*, 4-371.

77. ACCEPTANCE OF AMENDMENT. The fact that one corporation has been in possession of, and was exercising acts of ownership over the franchises and property of another, and was known by its name in conjunction with that of the company it had sought to merge into itself, raises a presumption that there had been an acceptance of the act of the legislature authorizing the consolidation and merger. This presumption, however, can not prevail against direct proof to the contrary, exhibited in a contract declaring, in express language, the terms upon which the transfer or charter and franchise was made, and to which its acts of possession and user are to be referred. *Id.*

78. —. The acceptance of a charter amendment, like the acceptance of an original charter, may be proved by showing that the corporation has done corporate acts authorized by the amend.

ment, which acts without the amendment would not have been authorized; *Kenton County Court v. Bank Lick Turnpike Co.*, **5-395**.

79. **ACCEPTANCE OF AMENDMENT.** It is not indispensable that the vote of acceptance of a charter amendment, or other enactment, should appear of record on the books of a corporation; such acceptance may be inferred from the acts of the corporation through its officers, or otherwise; *City of Covington v. Covington & Cincinnati Bridge Co.*, **5-388**.

80. —. Legislative alterations of a private corporation, if merely auxiliary, may be adopted by a majority of the corporators, and such acceptance will bind the whole; but, if such alterations be fundamental, the acceptance must be unanimous; *State, ex rel. Att'y Gen. v. Accommodation Bank of Louisiana*, **5-405**.

81. —. Where a corporation, by its conduct, accepts the benefit of an act amending its charter, it must take it as a whole, with its burdens also; *Kenton County Court v. Bank Lick Turnpike Co.*, **5-395**.

82. —. When an amendment to the charter of a private corporation aggregate is silent upon the subject of the acceptance, by the corporation, of an amendment to its charter, an acceptance thereof may be shown by any corporate acts which necessarily imply a previous valid acceptance of the provisions of the amendment; *State of Minnesota v. Sibley et al.*, **7-624**.

83. **ACCEPTANCE OF AMENDMENT — MINORITY.** Amendments which are not "fundamental," may be accepted by a majority of the stockholders; *Mower v. Staples*, **10-677**.

84. —. An amendment increasing the number of directors from five to nine, is not "fundamental," and its acceptance by a majority of the stockholders is binding. *Id.*

85. **MEANING OF MAJORITY.** By a majority of stockholders, is meant a majority per capita, where the right to vote is per capita, and a majority of stock where each share of stock is entitled to a vote. *Id.*

86. **PERMISSIBLE AMENDMENT.** An amendment to the charter of a corporation (insurance) which makes the company an exclusive stock company (*Spec. Laws 1865, ch. 61*), the original charter having created it as a mutual company with authority to issue stock policies (*Laws 1853, chs. 7, 8*), is not obnoxious to that clause of the constitution of Minnesota which forbids the formation of corporations by special act; *St. Paul F. & Mar. Ins. Co. v. Allis et al.*, **7-616**.

87. **AOT NOT VIOLATING.** A statute prohibiting the employment of all persons under the age of eighteen and of all women, in laboring in any manufacturing establishment within the state, more than sixty hours per week, violates no contract of the commonwealth, implied in the granting of a charter to a manufacturing company; *Commonwealth v. Hamilton Manuf. Co.*, **7-451**.

88. **INVALID AMENDMENT.** The charter of St. Charles College, incorporated by the state of Missouri, required the college to be conducted, by its curators, upon the principles of its foundation, as "an institution purely literary, affording instruction in ancient and modern languages, the sciences and liberal arts, and not including or supporting, by its funds, any department for instruction in systematic or polemical theology, nor instituting any regulations which should render a place in its classes offensive to reasonable or liberal minded persons, whatever may be their religious opinions." It was held, that an amendment of the charter providing that the concurrence of the Missouri annual conference of the Methodist Episcopal Church South should "be requisite in filling all places in the board, upon the conference affording, to the board, satisfactory assurances for the maintenance and endowment of the college," by requiring the concurrence, in the choice of curators, of an ecclesiastical body, representing one of the religious denominations of the state, endangered, in this respect, the principles of the foundation; and, even if it did not, it changed the character of the administrators of the trust, hindered the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially injured the contract upon which he advanced it; *State, ex rel. Pittmann et al., v. Adams et al.*, 3-515.

89. **VARIANCE OF NAME.** A discrepancy between the correct corporate name of the defendant corporation, as given in the original charter (Laws 1857, Ex. sess., ch. 60), and the corporate name used in the special laws of 1857, chapter 134, amendatory of the charter, held unimportant, in view of the clear intention of the legislature and of the provisions of special laws of 1868, chapter 120; *Cotton v. Miss. & Rum River Boom Co.*, 7-603.

90. **PROVISION OF, AS TO DURATION.** The words "perpetual succession" used in the charter of a private corporation, without other words of limitation or restriction, signify an indefinite duration; and are not to be understood in the sense of continuous, or uninterrupted, succession. A corporation chartered with perpetual succession is not limited as to its existence by a general law which confines the duration of all corporations, where there is no limit in its charter, to the term of twenty years; *Fairehild v. Masonic Hal' Association*, 8-278.

91. **NEW CHARTER.** The acceptance of a new charter, by a corporation, is a surrender of exemptions before existing; *State v. Maine Central R.R. Co.*, 7-284.

92. **EXTENSION OF.** The charter of a railroad company provided that if the road should not be constructed and put in operation in five years the charter should become void. The road was constructed in part and, six days before the expiration of the five years, an act was passed by the legislature authorizing the company to issue its bonds to a large amount, drawing interest payable

semi-annually, to be guaranteed by a municipal corporation, which should be secured by mortgages of the property and franchises of the company. Held, that the time for the completion of the road was thereby extended and the charter continued in force an indefinite time; *Foster v. Fitch et al.*, **3-174**.

93. **EXTENDING DURATION.** By its original charter, passed in 1857, defendant was made a body corporate . . . for the period of fifteen years. In 1867 the charter was amended by striking out the words "for the period of fifteen years," and, also, by changing the form of proceedings for condemnation. Held, that neither of the amendments infringes upon that provision of the constitution prohibiting the formation of corporations under special act; *Cotton v. Missis. & Rum River Boom Co.*, **7-603**.

94. **EFFECT OF REVIVAL.** It was provided in the charter of a corporation that in the event of non user during a period of eight years, all the privileges and immunities granted should cease and terminate. Non user existed for twelve years, at the expiration of which period, the legislature passed an act to revive and amend the charter, making, however, no provision for any new or further organization. It was objected that the acts specially mentioned, in the act of revivor, only were revived, and that the old board of directors were not authorized to act, so that the company was left without organization, directors or officers, wherefore it was incompetent to contract. Held, as there had been at no time a judicial finding and declaration of forfeiture, the act reviving the charter of the association must be construed to intend the revival and continuance of the organization as it existed de facto at the time of the passage of the act; *Phillips et al. v. Town of Albany et al.*, **4-220**.

95. **RESERVATION OF POWER TO REPEAL.** A general act of the legislature of the state of Kentucky reserved to the legislature the right to amend or repeal all charters and grants to corporations, unless the contrary intent be therein plainly expressed. Subsequently the legislature incorporated an insurance company by an act in which no such intent was expressed. Held, that the reservation of the general law was a part of the special charter, and that an act repealing the charter was constitutional; *Griffin v. Kentucky Ins. Co.*, **1-530**.

96. **ALTERATION OR REPEAL.** It is the well-settled law of the state of New Jersey that the provisions of a special charter shall not be altered or repealed, except by express words; *State, The Morris & Essex R.R. Co., v. Commissioners of Taxation*, **8-376**.

97. **GENERAL REPEALER.** A general repealer in a general law can not disturb the provisions of a special charter. *Id.*

98. **REPEAL BY GENERAL LAW.** If the prior clauses of a general law apply, in express terms, to a special corporation, a general repealer would repeal inconsistent provisions in the special charter. If there is an absence of such express prior reference there must

be a special repealing clause to make a general law applicable to such particular corporation. *Id.*

99. REPEAL OF. The charter of a corporation provided "the legislature may, at any time, alter, amend or repeal this act, . . . but such alteration, amendment or repeal, shall not be made . . . unless it shall be made to appear, to the legislature, that there has been a violation, by the company, of some of the provisions of this act." An act of the legislature was passed, without preamble or recital, but simply declaring that the act "be and the same is hereby repealed." On question as to the validity of the repealing act, held, (a) The right of the legislature to repeal, when it is properly made to appear that a breach of the charter has taken place, can not be questioned. (b) The inquiry into the fact of violation would be an inquiry for the legislature, for the purpose of enabling the legislature to exercise its legitimate powers, and if such inquiry be legislative in character, it might be entered upon in any manner, and through any channels the legislative wisdom might devise or see fit to employ, untrammelled by any of the rules which govern the action of judicial tribunals. (c) A legislative act, not violative of any constitutional principle, must be its own sufficient and conclusive evidence, when assailed, of the justice, propriety and policy of its passage. (d) The determination whether a corporation has violated its charter, is judicial in its nature. It involves a question which is or may be disputed, there are adverse parties, private interests involved, evidence to be received, a fact to be found, punishment to be inflicted, a forfeiture to be enforced. It, therefore, requires the action of tribunals which must hear, before they condemn, and must proceed upon inquiry. Except on trial in such a forum, the violation of a charter can not be legally made to appear; *Flint & Fentonville Plankroad Co. v. Woodhull*, 4-449.

100. PRIVATE RIGHTS. A statute of Wisconsin enacted, in substance, that all lands thereafter acquired by the West Wisconsin Railroad Company and of which the title in fee should become vested in it, in pursuance of an act of congress granting lands in aid of railroads and the state laws under it, should be exempt from taxation during a period of ten years from the passage of the act, but that all such land which should be sold, contracted to be sold, leased or conveyed, should immediately become subject to taxation. The same act authorized the company to borrow money upon bonds secured by a mortgage or trust deed upon such lands, thereafter to be acquired. In 1870 the time of exemption was extended ten years as to such lands as then remained unsold, etc., by the company, upon condition the company should complete its road within two years. The road was completed in advance of the date specified. In 1871 the legislature repealed the exemption so far as it applied to lands in Trempealeau county.

The company had issued its bonds, secured by trust deed on all its property, under the authority theretofore granted, covering all its property, real, personal and mixed, and had negotiated these to the extent of some \$4,000,000. The constitution of Wisconsin provided that all general and special laws under which corporations not having banking powers might be created "may be altered or repealed by the legislature at any time after their passage." It was held that the repealing act was valid. The original corporators, the stockholders and purchasers of the bonds of the company, secured in part upon the lands, acquired their respective rights with knowledge of and subject to the reserved right of the legislature; *West Wisconsin Ry. Co. v. Board of Supervisors of Trempealeau County*, 5-641.

101. **LIMIT TO REPEALS, ETC.** Rights vested in a private corporation, by its charter, no subsequent legislation can affect, but a charter may be amended in so far as is necessary to enable the corporation to carry into effect, or accomplish the purpose, for which it was granted; *City of Covington v. Covington & Cincinnati Bridge Co.*, 5-388.

102. **CHANGE OF PURPOSE.** When a number of persons associate themselves together, in a corporate body, for definite purposes and objects specified in their charter and for a time settled by it, such objects and business can not be changed, abandoned or sold out, within the time specified, save with the consent of all the corporators. One stockholder, however small his interest, can prevent it. *Black et al. v. Delaware etc. Canal Co. et al.*, 5-547.

103. **REPEAL OF ACT ADOPTED BY IT.** Where an act of incorporation adopts as a part thereof another act, the repeal of the latter act does not take it from the charter in which it was adopted, and of which it was made a part; *Beer Co. v. Massachusetts*, 6-43.

104. **REPEALABLE GRANTS.** A police regulation, even if conferred upon a corporation by its charter, can be resumed by the legislature at pleasure. The legislature can not abandon the police power, or give a vested right to its exercise by a municipal or private corporation, or to private individuals; *Dingman v. People*, 3-256.

105. —. A clause in the charter of an educational corporation, forbidding the sale of intoxicating liquors within the neighborhood of the institution, is not to be construed as a grant of power or privilege to the corporation, but as an exercise of the general police power of the legislature. It may, therefore, be repealed. *Id.*

106. —. When the legislature has reserved a general power of altering, amending or repealing a charter, it may impose any additional conditions or burden, connected with the grant, which it may deem necessary for the welfare of the public and which it

might originally and with justice have imposed; Commissioners of Inland Fisheries *v.* Holyoke Water Power Co., **3**-445.

107. **REPEAL; EFFECT.** Upon the absolute repeal of a charter by the legislature, acting within the limits of its constitutional authority, the corporation ceases to exist and no judgment can be rendered against it in an action at law. Such repeal does not, however, impair the obligation of contracts made by the corporation, with other parties, during its existence, or prevent its creditors, or stockholders, from asserting their rights against its property in a court of equity; Thornton *v.* Marginal Freight Ry. Co. et al., **7**-467.

107½. —. The repeal of a general incorporation statute, by a statute substantially re-enacting and extending its provisions, does not terminate the existence of corporations organized under such repealed statute; U. Heb. Ben. Assoc. *v.* Benshimol, **7**-536.

108. **NEED NOT SPECIFY POWERS.** It is not necessary that the charter of a company should specify the powers granted to it, except so far as to specify the purposes of the company and to define its franchises; Wood Hydraulic Hose Mining Co. *v.* King, **4**-344.

109. **LIMITATIONS OF.** Where a provision or reservation is enacted as a part of the charter, reserving the power to alter, modify or repeal, such provision qualifies the grant, and the subsequent exercise of the power reserved can not be regarded as an act within the prohibition of the constitution; Miller *v.* State of New York, **4**-256.

110. **LIMITATIONS BY GENERAL LAW.** It is competent for the state to limit a charter by general law of the state, applicable to all acts of incorporation or to certain classes of the same, as the case may be; in which case the power to alter, modify or repeal, as may be provided for, may be exercised whenever it appears that the act of incorporation sought to be affected is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. *Id.*

111. **HOW CONSTRUED.** An act creating a corporation with the powers and privileges of another corporation formerly created, by reference, without stating the powers granted, should be construed strictly against the corporation when the rights of others are concerned; State *v.* Maine Cent. R.R. Co., **7**-284.

112. **RULE OF CONSTRUCTION.** Grants of franchises and special privileges are, always, to be construed most strongly against the donee and in favor of the public; Turnpike Co. *v.* Illinois, **6**-30.

113. —. Legislative contracts, embodied in charters, are to be construed most favorably to the state, if, on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation. But, as every contract is to be construed

to accomplish the intention of the parties, if there is no ambiguity and the intention clearly appears, on reading the instrument, the court is as much bound to uphold and sustain it, as if it were a contract between private persons; *Home of the Friendless v. Rouse*, **3-7**.

114. **RULE OF CONSTRUCTION.** It is a well settled rule, for the construction of charters of incorporation, that they are to be construed strictly in their grants of power, and that nothing is to be implied in favor of the company; *Central R.R. Co. et al. v. Collins et al.*, **3-224**.

115. —. Any ambiguity in the terms of the grant must operate against the corporation and in favor of the public. The corporation can claim nothing that is not clearly given by the law. The charter is not to receive a strained or unreasonable interpretation contrary to the obvious intention of the grant. It must be fairly examined and considered and reasonably and justly expounded. If upon such an examination there is doubt or ambiguity in its terms and the power claimed is not clearly given, it can not be exercised. The rights of the public are never presumed to be surrendered to a corporation unless the intention to surrender clearly appears in the law; *Lake v. Virginia & Truckee R.R. Co.*, **4-526**.

116. —. It is the duty of courts to strictly construe the law touching the rights, duties and obligations of corporations in all cases arising between corporations and third parties, as well as in many cases arising between corporations and individual stockholders; *Willamette Freighting Co. v. Stannus*, **4-64**.

117. —. In construing the charter of a corporation, in respect of its powers, every resolution, which springs from doubt, is against the corporation; *Marion Sav. Bank v. Dunkin*, **6-113**.

118. **CONSTRUCTION AS TO POWERS.** In a proceeding in a court of equity, if it be not shown in what manner a corporation came into being and by virtue of what authority, by appropriate pleading, the court will refer its powers to a general law authorizing the formation of such corporation and define them by its standard; *Kelly et al. v. Trustees of the Alabama & Cincinnati R.R. Co.*, **6-130**.

119. **LIMITATION OF.** By analogy to the rule of the common law, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, will create only an estate for the life of the corporation; *Turnpike Co. v. Illinois*, **6-30**.

120. —. A right or capacity granted, even in the most unqualified form, can not be construed as conferring any greater or more sacred right than any citizen has in the attainment of the same object and the carrying out of the like purpose; nor under it will a corporation be exempted from any control to which the

citizen would be subject, if the interests of community should require it; *Beer Co. v. Massachusetts*, 6-43.

121. INTERPRETATION OF LANGUAGE. When there is any thing in the law incorporating a company calling for interpretation, on account of ambiguous or indefinite language, we must explain the meaning in view of the objects of the enactment — its purposes — and consider the appropriateness of the language used to the supposed purpose in view of the legislature; *Moyer v. Pennsylvania Slate Co. et al.*, and *Keller v. The Same*, 4-136.

122. IMPORT OF GENERAL WORDS. General words, in an act of incorporation, do not authorize the company incorporated to do acts which, by the public law, are indictable; plain and positive words are necessary to confer such a privilege. The charter of the North Carolina Real and Personal Estate Agency, in providing that "the said agency shall have the right and power to sell and dispose of any real or personal property placed in their hands for sale, in any mode or manner the agency shall deem best," did not authorize the agency to sell property by means of a lottery: *State v. Krebbs and Kimball*, 3-632.

123. INCIDENTAL POWERS. The rule that a grant of a privilege is a grant of necessary incidents to the enjoyment of that privilege has no application to apply to or embrace any privilege which, though incidental to the grant, is expressly excepted from, or forbidden to be enjoyed by the grant; *Plummer v. Penobscot Lumbering Ass'n*, 7-305.

124. EXEMPTIONS BY. An exemption from the operation of a general law contained in a charter, must be regarded as limited to the particular corporation; and as continuing and effective only during its corporate existence and so long as it can comply with its chartered duties and obligations; and no longer; *State v. Maine Central R.R. Co.*, 7-284.

125. STATUTE CONSTRUED. The statute of Kentucky reserving to the legislature the power to repeal or amend corporate charters contained the proviso "that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair rights previously vested." It was held to apply to rights of beneficiaries and others vested under the charter, and not to affect the right of repeal of the franchise; *Griffin v. Ky. Ins. Co.*, 1-530.

126. —. The fact that an act for the incorporation of plank and turnpike road companies denominates companies which may be formed under its provisions "joint stock companies," is not conclusive that such companies are not corporations, where the powers, rights and liabilities of the companies provided for in the act show, they are, in fact, corporations; *Blanchard et al. v. Kaull et al.*, 4-289.

127. TIME TO ORGANIZE. A statute providing that no corporation organized under that statute shall commence to exercise cor-

porate privileges until ten per cent. of its capital stock has been paid in, and no charter shall have any force for a longer period than two years unless the incorporators within that time shall commence to exercise the powers granted, does not apply to charters granted by special act of the legislature; *City of Atlanta v. Gate City etc. Co.*, 10-150.

128. WHAT CONSTITUTES. In corporations organized under a general law, the law itself, and not the declaration filed, or the constitution and by-laws adopted, becomes the charter, and enumerates the powers and defines the privileges which may be exercised or enjoyed; *Grangers Life & Health Ins. Co. v. Kamper*, 10-21.

129. CREATION BY; ORGANIZATION UNDER; POWERS. A charter of incorporation provided that the persons therein named, "and all others who are now or may hereafter become associated with them and their successors and assigns be and they are hereby created a body politic and corporate under the name and style," etc. This provision was not a proposition to create a corporation upon the performance of precedent conditions; but was the creation of a corporation, requiring the performance of no other act but the acceptance of the charter by the corporators; and, if they had applied for the grant of the charter, that was an acceptance in advance; and any action under the charter would be an acceptance of it. Provision "that the capital stock of the said company shall amount to \$60,000, and that it shall be divided into shares of \$100 each," did not make the subscription of the \$60,000 a condition precedent to the organization of the company by the election of directors, a president and a secretary, it being expressly provided in the charter, that the corporation "might make all by-laws, rules and regulations for the management of its business, property and effects and the transfer of stock, as to them may seem best." Under these provisions, the president and secretary of such company, elected before the \$60,000 were subscribed to the capital stock, could bind the company by a contract made after such subscription, if it was within the powers granted the corporation; but, query, would such contract have been binding if made before such subscription; *Perkins v. Sanders et al.* 8-53.

130. CONSTRUCTION—THE WORD "MAY." A charter of a log driving company, provided that the "company may drive all logs and other timber," in a certain stream. The word "may" is to be construed as permissive and not imperative in considering the statute as such; but when the company, authorized by the statute to be organized, accepts the act and the privileges by it conferred of driving all the logs, etc., it assumes a duty commensurate with the privilege conferred, and taking an exclusive right to drive all the logs, the duty to drive them all results; *Weymouth, survivor, v. Penobscot Log Driving Co.*, 7-327.

131. **CONSTRUCTION.** A charter acquired after the passage of a general law applicable to all corporations to be organized under it, is subject to such general law, which becomes a part of the charter. Wherefore, where there was a constitutional provision that the legislature should enact no law authorizing private property to be taken for public use, without just compensation being first paid or tendered, and a charter was granted referring to an instrument of grant of date prior to the adoption of the constitutional provision and which did not provide for such prior payment of just compensation, it was held, this charter must, for the purposes of the newly authorized corporation, be construed consistent with the constitution and so as to require such payment. Otherwise the particular provision as to the taking of private property, etc., would be inoperative; *State of Maryland v. Consolidation Coal Co.*, 7-364.

132. **WHO ARE ASSOCIATES; ADMISSION OF MEMBERS.** The original charter of a corporation enacts: "That C. K. Smith" — and eighteen other persons designated by name — "and their associates, be and they are, hereby, constituted a body corporate and politic, by the name of the Minnesota Historical Society, and, by that name, they and their successors shall be and they are, hereby, made capable in law to contract, . . . and to enjoy all the privileges and franchises incident to a corporation." So far as appears, the legislature granted the charter of its own motion, without any petition or application from any one. Held, (1) the word, "associates," as here used, referred to such persons other than those specifically named as incorporators as might thereafter become members of the corporation which was created by the act; (2) as a corporation, in the absence of restrictive legislation, it had the right of admitting new members, as one of its incidental powers; (3) the corporate powers are vested in the corporation and, after its organization, the right of exercising such powers resided in the whole body of its members, acting in an organized capacity, and in obedience to the will of a majority; *State of Minnesota v. Sibley et al.*, 7-624.

133. **WHICH CREATES A CORPORATION.** An organization under a charter which provides that certain persons, therein named, with their associates and successors, "are hereby made and constituted a body politic and corporate," and, as such, may sue and be sued, prosecute and defend, to final judgment and execution, and may hold real and personal estate, not exceeding in value a sum mentioned, at any one time, and may grant and vote money and have all the powers and privileges and be subject to all the liabilities incident to corporations of a similar nature, constitutes a corporation. It is not necessary that it should have stock or stockholders; for, in the absence of either, it may have capital. Being a corporation, it would be liable to any person suffering damages

through a negligent performance of any of its duties ; Weymouth, survivor, *v. Penobscot Log Driving Co.*, 7-327.

134. PRESUMPTION AS TO. Every person dealing with a corporation, or receiving its obligations, is supposed to be cognizant of the provisions of its charter ; Lowry et al. *v. Inman*, 4-549.

135. IN CONFLICT WITH CONGRESSIONAL ACT. Commerce between states being a matter delegated to congress to be by it regulated, the statute of a state which shall grant to a corporation (in this case a telegraph company), an exclusive right to construct and operate necessary works, conflicting with an act of congress, upon the same subject matter, is inoperative as to any corporation which is entitled to the privileges of the act of congress ; Pensacola Tel. Co. *v. Western Union Tel. Co.*, 6-48.

136. CONFLICT OF LAWS. The decisions of the supreme court of the United States, while entitled to great respect, are not of binding authority on a state court in the construction of one of the statutes of the state, especially when such construction is at variance with the previous decisions of the state court ; Penn *v. Bornman et al.*, 9-134.

137. CORPORATIONS CREATED BY STATE IN REBELLION. Corporations created by the legislature of a state in armed rebellion against the United States, are empowered since the restoration of the normal condition of that state as to the Union and the states composing it, to sue and be sued in the federal courts ; provided, however, their acts of incorporation had no relation to any thing else than the domestic concerns of the state and were neither in purpose nor operation hostile to the United States or in conflict with its constitution ; but were, in fact, created in the ordinary course of legislation, such as there might have been had there been no war or attempted rebellion, and such as is of annual occurrence in all the states ; United States *v. Ins. Cos.*, 5-98.

138. ACTION IN A STATE NOT OF ITS CREATION. While corporations can exercise no corporate powers within the limits of a state, not the state of its creation, without the consent of the latter ; yet, when that consent is given, the amendment of the charter of the company by the state creating it by a provision which conflicts with some law or constitutional provision of the state licensing the corporation, can not destroy the validity of the amendment ; City of Covington *v. Covington & Cincinnati Bridge Co.*, 5-388.

139. CONFIRMATORY ACTION OF ANOTHER STATE. The action of one state in confirming the act of incorporation of a company incorporated by another state, creates no compact or agreement by which like legislation must be obtained from each state before an amendment could be made to the original charter, or additional power given to the corporation. *Id.*

140. JUDICIAL NOTICE OF. Courts will not take judicial cognizance of the charter of a private corporation, nor of its corpo-

rate powers or capacity, if it derives its existence from a special act of incorporation. If it is shown to be organized, existing and acting under a general law, the court must take notice of the source of its creation and its provisions; *Kelly et al. v. Trustees of the Alabama & Cincinnati R.R. Co.*, 6-130.

141. COPY AS EVIDENCE. A copy of the charter of a corporation, duly certified by the secretary of state, under the seal of the state, is evidence of the creation of such corporation; *M'Cune Mining Co. v. Adams*, 10-430.

142. UNCONSTITUTIONAL AS A DEFENSE. An act of the legislature was adopted as a law, by which a so called charitable association was established and subsequently organized and placed in operation. The supreme court of the state held the act of its creation to be unconstitutional and so void. The act could not be pleaded or admitted in defense of an agent of the association in a suit to recover from him money received while acting as such agent; *Harris v. Brooks*, 6-116.

143. EXPIRATION BY INJUNCTION. The charter of a corporation expires when an injunction against its further operation is made perpetual; *Dane et al. v. Young et al.*, 4-425.

144. FORFEITURE. The charter of a corporation can be forfeited only at the instance of the state; *In re Louisiana Sav. Bank*, 10-466.

145. —. A cause of forfeiture, such as non user of the franchise that has been judicially declared, can not be taken advantage of collaterally, as in a proceeding to collect benefits; *Barren Creek Co. v. Beck*, 10-333.

146. —. A charter may be forfeited for non user or misuse, but its dissolution for either of these causes can be effected only by the judgment of a court of competent jurisdiction. Such matters can not be set up collaterally; *City of Atlanta v. Gate City Gas Light Co.*, 10-150.

See ARTICLES OF ASSOCIATION; CONSTITUTIONAL LAW; DISSOLUTION; FORFEITURE; FRANCHISE; INCORPORATION; LEGISLATIVE POWER; ORGANIZATION; POLICE POWER; SURRENDER OF CHARTER.

CHURCH ORGANIZATION.

1. CORPORATE EXISTENCE. The corporate existence of a church association is not proved by evidence that the members held the ordinary meeting of a church society and elected officers; *Fredenburg v. Lyon Lake Meth. Epis. Ch.*, 6-605.

2. POWER IMPLIED. Undoubtedly, the power to erect a church building carries with it power to raise the necessary means to accomplish the purpose; and, to this end, debts may be contracted, and notes would evidence the indebtedness; *Cattron et al. v. First Universalist Soc. of Manchester*, 6-534.

3. ELECTION OF TRUSTEES. In the absence of rule, regulation,

or discipline governing an ecclesiastical body as to its election of trustees, if usage or custom may amount to a rule, strict compliance with such usage and custom must be shown to validate an election; *First African Meth. Epis. Zion Ch. etc. v. Hillery et al.*, 6-232.

4. **NECESSITY OF NOTICE OF ELECTION.** If custom has established the giving of a notice of annual election of trustees, there being no rule or regulation adopted as to such election, an election without such notice will not constitute the persons elected officers de jure. *Id.*

5. **TRUSTEES DE FACTO.** It is not unlawful for trustees de facto of a church to eject persons, claiming to be trustees de jure under an invalid election, who enter upon the temporalities of the church; such intermeddlers being neither trustees in law or in fact. *Id.*

6. **USURPATION.** Entry upon the temporalities of an ecclesiastical corporation and notice of dismissal to its pastor by persons claiming to be trustees under an illegal election, will not constitute such persons trustees de facto. *Id.*

7. **ACCEPTANCE OF OFFICE; ESTOPPEL.** The acceptance of the office of treasurer of a church association does not estop the incumbent from denying it has a corporate existence, in the absence of proof of corporate acts; *Fredenburg v. Lyon Lake Meth. Epis. Ch.*, 6-605.

8. **MEMBERSHIP; SUBSCRIPTION.** Agreement by several to pay the sums set opposite their names, signed to a subscription paper, to a treasurer to be appointed for the building of a church edifice. A treasurer was appointed, and at meetings, at which defendant was present, not objecting, an organization was perfected, officers appointed, and the work carried through, and the organization later became incorporated. The subscription was held to be binding; but, to recover on it, it must be shown that, when the paper was circulated for the obtaining of subscriptions, it was the understanding and purpose that the edifice should become part of the temporalities of an incorporated religious society; *Presbyterian Soc. v. Beach*, 8-537.

9. **DUTY OF OFFICERS.** It is the office of the managing committee of an ecclesiastical society to transact the business incident to the purposes for which the society was brought into existence; *Harrison v. First Presbyterian Soc. of Hartford*, 6-315.

10. **MANNER OF CONTRACTING.** In the absence of evidence showing in what manner a church organization contracts debts and executes contracts, when it appears there are trustees, it will be presumed such trustees are intrusted with the control of the temporalities of the church and empowered to make contracts and incur liabilities, on account of the church property; *St. Patrick's Roman Catholic Church etc. v. Gavaton*, 6-372.

11. **EXECUTION OF CONTRACT.** The trustees of a religious society are the corporate body and they alone can act for and

bind the society by the corporate name. Such trustees should sign as trustees, giving the name of the society adopted; *Little, adm'r, v. Bailey et al.*, 6-413.

12. **TRUSTEES; HOW TO ACT.** The trustees alone can act to execute contracts for a church; and, that their contracts may be valid and binding, they should act as a body, or delegate power to one of their number, or other person, or ratify and approve the acts of the person acting for them. The unauthorized act of one trustee can not bind the church as a corporation; *St. Patrick's Roman Catholic Church etc. v. Gavaton*, 6-372.

13. **EMPLOYMENT BY PRIEST; TRUSTEE.** Where the officiating priest is also one of the trustees of a church, and he shall employ a person to work for the church without authority from his co-trustees, and his act is not ratified by them, the church, as a corporation, is not liable. *Id.*

14. **ALIENATION OF REAL PROPERTY.** It seems that the only method by which a religious corporation can divide its real estate and vest a portion thereof in a part of its congregation, set off from the parent organization, is by legislative enactment; *Reformed Church of Gallupville v. Schoolcraft et al.*, 8-450.

15. **PUBLIC POLICY; ALIENATION.** Since the passage of the statute of New York authorizing religious corporations to sell their real estate, upon order of the chancellor, it would seem such sales can only be considered as against public policy when unauthorized by the proper tribunal. *Id.*

16. —. Even if the alienation of the real estate of a religious corporation be against public policy, such a corporation may lose title thereto by adverse possession. The statute of limitations operates as well against corporations as against natural persons. *Id.*

17. **ADVERSE POSSESSION.** A resolution of the governing body of a religious corporation, purporting to transfer a portion of its real estate to a new organization, consisting of members of the parent society, set off therefrom, is sufficient to lay the foundation of an adverse possession. *Id.*

18. —. Where the officers and members of a new society, composed of a part of a parent religious organization, set off from it by competent authority of the old organization, take possession of premises allotted to such new society and, thereafter, without being formally incorporated, occupy such premises, claiming to own them, and subsequently a corporation is duly organized, under a general law providing for the organization of religious corporations, it succeeds, without formal conveyance, to the property of the society and to all property held for its use, and, in such case, there is such a continuity and privity of possession and estate as will enable the last possessor to tack to his possession the prior possession, so as to establish title by adverse possession. *Id.*

19. **QUALITY OF TITLE ACQUIRED.** A deed conveyed certain premises to a religious corporation, reserving a right to build a

basement story upon the premises, to be used solely for the purposes of a school, with a right of passage to and from the same; the grantee to build a church upon the basement walls; a privilege was given grantee to purchase the basement. The deed vested the fee in the grantee, with the reservation of an easement merely; and, though the right to the basement was not forfeited by an omission to use it, or by a use of it for other than school purposes, the corporation, by action of ejectment, might cause the removal of persons occupying and holding possession of the basement for other than school purposes, the judgment awarding possession subject to the easement. *Id.*

20. **SEPULTURE AS A PROPERTY RIGHT.** A suit by a member expelled from a church corporation, to compel restoration to membership, on the ground that such restoration is necessary to enable him to enjoy the right of sepulture in church grounds, acquired by him as a member, is premature; *State, ex rel., v. Hebrew Congr., 7-239.*

21. **JURISDICTION OF CIVIL COURTS.** Although the civil courts will not, in case of persons excommunicated by competent church authority, go behind that authority and inquire whether the persons have been regularly or irregularly excommunicated, the court may inquire whether or not the expulsion was the act of the church; *Bates et al., trustees, et al. v. Houston et al., 9-47.*

22. —. When property is devoted to the promotion of a specific doctrine, the civil courts will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith and practice of the parties claiming its use, and will see that it shall not be diverted from that trust. *Id.*

23. **INSTANCE.** The wrongful and violent seizure of the edifice and property belonging to a church of the congregational form of government by a minority of the members, contrary to the wishes of a majority; the deposition of the officers of the church and trustees, who hold the property; and, the retention and use thereof by the minority, to the exclusion of the majority, furnish good grounds for equitable relief. *Id.*

24. **WHEN MANDAMUS NOT LIE TO.** A mandamus will not lie to compel a religious society to restore to its membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some one or more of the laws of the society. The civil courts will not revise the ordinary acts of church discipline, or the administration of church government; *State, ex rel. v. Hebrew Congregation, 7-239.*

25. **POWERS AS TO LITIGATION.** As managers of the affairs of an ecclesiastical society, its committee, or trustees, are in duty bound to resist proceedings, at law or in equity, which, if successful, will bar its revenue. It is not, however, within the scope of the duty, or power, of such managers to defend, at the cost of the

society, matter in litigation which is purely personal in its aim and effect; as in this case, to defend the legality of their own election when that was assailed; *Harrison v. First Presbyterian Soc. of Hartford*, 6-315.

See RELIGIOUS SOCIETY.

CITIZENSHIP.

1. OF MEMBERS OF CORPORATION; PRESUMPTION. The members of a corporation are legally presumed to be citizens of the state by the laws of which the corporation was created; *Hobbs et al. v. Manhattan Ins. Co.*, 1-583; *Manufs. Nat. Bk. v. Baack et al.*, 1-93.

2. NATIONAL BANKS. It is presumed that the members of a bank organized under the national bank act are citizens of the state in which the bank is situated. *Id.*

3. OF CORPORATION. A corporation itself can be a citizen of no state, in the sense in which the word "citizen" is used in the constitution of the United States; *Muller v. Dows*, 6-8.

4. PRIVILEGES AND IMMUNITIES. Corporations are not citizens within the meaning of that provision of the federal constitution which declares that the "citizens of each state shall be entitled to the privileges and immunities of the citizens of the several states." That provision of the constitution applies to natural persons, members of the body politic, owing allegiance to the state, and not to artificial persons; *Paul v. Commonwealth of Virginia*, 1-19; *Ducat v. City of Chicago*, 1-55; *Liverpool Ins. Co. v. Commonwealth of Massachusetts*, 1-30; *Ins. Cos. v. Commonwealth*, 1-485.

5. —. A corporation aggregate may be a citizen in the sense in which the term "citizen" is used in that part of the constitution which speaks of the judicial power of the United States. It may enforce legal rights, or may obtain redress for wrongs, not only in the state of its creation, but also in the other states of the Union, by virtue of the comity between the states. But, a corporation aggregate is not a citizen within the meaning of that clause of the constitution which declares "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;" *Ducat v. City of Chicago*, 1-426; affirmed, 1-55.

6. OF CORPORATION. A corporation is regarded as, in effect, a citizen of the state which created it; *City of St. Louis v. Wiggins Ferry Co.*, 3-79.

7. OF STATE OF CREATION. It is too well settled to be questioned that a corporation is a citizen of the state where it is created; *Quigley v. Central Pacific R.R. Co.*, 8-343.

8. FOREIGN CORPORATION. A corporation can be a citizen only of the state by the laws of which it is created. It may be permitted to transact business elsewhere, but can not, like a natural person, change its domicile; *Germania Fire Ins. Co. v. Francis*, 3-60.

9. ON CONSOLIDATION. Two corporations, organized and existing as such, under the laws of two different states, lawfully consolidating, become one; nevertheless, in the state of the organization of each constituent, the consolidated corporation is but a corporation of that state; *Muller v. Dows*, 6-8.

10. JURISDICTION. A corporation is a citizen of the state in which it is created, and the federal courts have no jurisdiction of actions between states and their own corporations; *Commonwealth of Pennsylvania v. Quicksilver Mining Co.*, 1-57; *Ins. Cos. v. Commonwealth*, 1-485.

11. —. In a suit by a state against a corporation, an averment that the defendant is a body "politic in the law of, and doing business" in another state, is insufficient to establish the jurisdiction of the federal courts; *Commonwealth of Pennsylvania v. Quicksilver Mining Co.*, 1-57.

12. JURISDICTION; NATIONAL BANKS. A district court of the United States has jurisdiction of a suit brought against an inhabitant of the district by a national bank located in another state; *Manufacturers' Nat. Bk. v. Baack*, 1-93.

13. —; PRESUMPTION; PARTIES. A suit against a corporation by its corporate name is regarded as a suit against citizens of the state which created it; the legal — and, for the purposes of jurisdiction, conclusive — presumption being that the members of the corporation are citizens of that state; *Hatch v. Chic., R. I. & Pac. R.R. Co.*, 1-79.

14. FOR PURPOSES OF SUIT. A corporation may sue or be sued in the federal courts; but, in such case, it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purpose of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its law, creates the corporation; *Muller v. Dows*, 6-8.

15. FOR CERTAIN PURPOSES. A corporation may be a citizen of a state, for the purpose of suing and being sued in the courts of the United States, and the laws of the state can not withdraw a citizen of another state from the operation of an act of congress nor deprive him of the right of removal of his cause to a federal court; *Herryford v. Aetna Ins. Co.*, 3-511.

16. QUÆRE. Whether by the act of March 2, 1867, for the removal of causes, the congress of the United States intended by the use of the words "citizen of another state" to include "artificial beings" such as corporations are; *Dodge, adm'r, v. Northwestern Union Packet Co.*, 3-502.

17. REMOVAL OF CAUSE. Corporations are citizens for the purposes of suit and are embraced within the federal legislation with reference to the removal of causes from state to federal courts; *Stanley v. Chic., R. I. & C. R.R. Co.*, 8-154; *Quigley v. Central P. R.R. Co.*, 8-343.

18. —. A suit in a state court in which a foreign corporation

is joined with other defendants who are residents of the state can not be removed to the federal courts unless such residents are merely nominal parties; but when the action is against the corporation and its officers, and no relief is prayed for as to any of such officers that is not prayed for as against the corporation, and no relief is prayed for against any officer in his individual capacity, such officers are merely nominal parties; and the action may, by proper proceedings, be removed; *Hatch v. Chic., R. I. & P. R.R. Co.*, 1-79.

19. **CHANGE OF FORUM.** Nothing done by a corporation in regard to the place or manner of transacting its business, and no statute of a state in which it transacts such business, can deprive it of its rights and privileges when sued in a state foreign to the one in which it was created, to remove such action in the manner prescribed by the acts of congress, from the state court to the proper court of the United States. *Id.*

20. **EXTRA-TERRITORIAL EXISTENCE.** A corporation has no legal existence beyond the territory of the sovereignty by which it is created, and its dwelling place is within such territory; *Hatch v. Chic., R. I. & Pac. R.R. Co.*, 1-79; *Commonwealth of Pennsylvania v. Quicksilver Mining Co.*, 1-57; *Ducat v. City of Chicago*, 1-55; *Liverpool Ins. Co. v. Commonwealth of Massachusetts*, 1-60; *Ducat v. City of Chicago*, 1-426.

21. **COMITY.** The right of a corporation created in one state to do business and make contracts, in the full enjoyment of its powers, in another state, is a right based upon the comity between the states, and is a voluntary act of the sovereign power; but when contrary to good policy, or when prejudicial to the interests of the state, the comity ceases to be obligatory; *Ducat v. City of Chicago*, 1-426.

22. —. So, an insurance company, incorporated under the laws of another state, coming into the state of Illinois to do business and make profits, may be taxed, and the legislature may rightfully discriminate between such corporations and domestic corporations of the same character, when, in their judgment, the policy and interests of the state demand it. *Id.*; affirmed, 1-55; *State of Louisiana v. Fosdick*, 1-581.

23. **TAXATION.** A state law imposing upon corporations organized in other states and transacting business within its jurisdiction discriminating conditions is not repugnant to the federal constitution, either as a discrimination between citizens of the United States, or as an exercise of the power to regulate commerce. *Id.*

24. **UNINCORPORATED ASSOCIATIONS.** The petition described plaintiffs as an association of persons, not incorporated, for the purpose of carrying on a banking business at Omaha, and that they were at the time the cause of the action arose, as well as at the time the action was commenced, engaged in said business at that place. Equivalent to an averment that their domicile was

at Omaha, and that it was a sufficient averment of citizenship; *United States Express Co. v. Kountze Bros.*, 1-45.

25. UNINCORPORATED ASSOCIATIONS; PLEADINGS. An averment that defendant is a foreign corporation organized under the laws of another state, is a sufficient averment that the defendant is a citizen of such state. *Id.*

CLASSIFICATION OF CORPORATIONS; see CORPORATIONS.

COLLEGE.

1. INCORPORATION AND FRANCHISE. The limitations upon the power of the legislature over incorporated colleges, as elucidated by the opinions in the Dartmouth College case, which has been substantially followed in all subsequent cases, are; that such corporations belong to the class of private corporations, as opposed to municipal or such as are owned entirely by the state; that they are strictly eleemosynary, contributing to our higher wants and, generally, furnishing to the comparatively poor, opportunities otherwise beyond their reach; that private contributions for the endowment of institutions of learning, on the faith of a charter, constitute a contract, between the contributors and others interested and the state; that the contribution is a sufficient consideration for the franchises given by the charter, the whole constituting a valid and binding agreement, not to be impaired by the state nor avoided by the corporation; that the trustees named in the charter and those chosen as their successors, according to its terms, are not only trustees of the fund, but, also, take the place of the founder of the charity, as its lawful visitors and overseers, their trust implying an obligation to govern according to the statutes of the founder, as embodied in the charter; that, in fulfilling this obligation, they can be controlled as other trustees, the only duty of the courts being to see that the trust is faithfully executed; and, that any statute making a substantial change in the charter, as by the addition of new trustees, or by a material change in the manner of choosing them, in the mode of expending the funds, or in the objects of the charity, impairs the obligation of the contract and is forbidden by the constitution of the United States; *State, ex rel., v. Adams et al.*, 3-515.

2. SUBSCRIPTIONS. If a number of persons subscribe to a paper, in and by which they promise to contribute money for the accomplishment of an object of interest to all of them, as the erection of a building for a college, and which object can not be accomplished save by their common performance, their mutual promises constitute mutual obligations, and are a sufficient consideration to support the promise of each; *Christian College v. Hendley*, 5-151.

3. CONSIDERATION FOR SUBSCRIPTION TO STOCK. Where a subscription to an educational society is made upon condition that a

certain amount shall be obtained in cash, or promissory notes given, for the same purpose, the labor and expense necessary to obtain such amount, if it is obtained, is a good consideration for the subscription; Trustees of Kentucky Baptist Education Society *v.* Carter, 5-290.

4. **ENDOWMENT NOTE; NOT NEGOTIABLE.** A note was executed in the following words: Ten years after date, for value received, I promise to pay to the treasurer of Wilton Collegiate Institute the sum of \$1,000, as endowment, with annual interest, at ten per cent., to secure two permanent scholarships, No. —, in said collegiate institute, said scholarships to be available on the payment of the interest annually. The supreme court of Iowa held, (1) the note was not negotiable and that it could not be sold, at sheriff's sale, to pay the debts of the institute, so as to pass, to the purchaser, a right to recover thereon, regardless of the equities existing between maker and payee; wherefore, (2) a good defense was presented by allegations, properly pleaded, (a) that the note was given, in consideration of two perpetual scholarships, to raise an endowment, which was to constitute a trust fund, which fund could not be appropriated to the payment of the debts of the institution; (b) that the institution had become defunct and that, thereby, the maker of the note was deprived of his scholarships, as well as defeated in his purpose to aid in endowing the institute; (c) the note was not to be valid unless \$40,000 endowment should be raised, and that only \$2,000 were raised; Ingham *v.* Dudley, adm'r, 9-312.

5. **CURATORS OF A COLLEGE.** Curators may have an absolute right to their places; such a right as would be sustained without reference to the question of possession; and, even under lawful judicial proceedings against them, or a right to continue until removed by such lawful judicial proceedings; State, *ex rel.*, *v.* Adams et al., 3-515.

6. **POWERS OF TRUSTEES.** The trustees or curators of an eleemosynary institution, such as an incorporated college, the charter of which is an absolute grant, subject only to the conditions imposed, have no power over the charter; on the contrary, it is their creator and their absolute rule of conduct. The beneficial interest, in the charity fund, belongs neither to them or to the state, but to the beneficiaries only, who, from the nature of the case, can not consent to any change in the charter. Hence, its essential conditions are permanent, so far as change depends upon consent, and the acceptance of a legislative amendment to the charter of such an institution, by its board of curators, gives such amendment no validity. *Id.*

7. **AUTHORITY OF TRUSTEES WITH VISITORIAL POWERS.** The authority of trustees of an eleemosynary corporation, having visitorial powers, is more extensive over the concerns and management of the corporation than that of directors of a private

moneyed corporation, such as a bank or railroad. In eleemosynary corporations there are no stockholders and regulations, that in ordinary corporations are made by stockholders, and disputes which are submitted to the courts are, in the case of eleemosynary corporations, made and decided by those intrusted with the visitorial power. The visitor is the judge or arbiter to decide all disputed questions not involving the integrity of the management of the fund, or the observance of the statutes of the founder, and he, alone, can make regulations and by-laws that shall bind the officers. There being no constituent members, he, in a sense, is the corporation and controls its operations, subject only to the expressed will of the founder. *Id.*

8. POWER OF TRUSTEES LIMITED. The authority of trustees of an eleemosynary corporation having visitorial powers is not absolute. It does not extend to enable them to accept, on behalf of the corporation, any and all amendments to the charter which the legislature may prescribe. Amendments found necessary to adapt the management of the corporate affairs to altered conditions, and enabling the corporation to attain the general objects of the founder by more appropriate means, may be sustained, when enacted by the legislature and accepted by the trustees, but, it is not competent for such trustees to accept amendments which change the character and purpose of the foundation or divert the property from the uses which the donor designed. *Id.*

9. LEGISLATIVE POWER OF AMOTION. Where in a university, which is a state institution, and which the state has been in the habit of governing by means of curators appointed by the legislature (in this case the University of the state of Missouri) a professor was appointed, for the term of six years from the date of such appointment, "subject to law," it is within the power of the legislature to vacate his office at discretion and without fault on his part and order a new election of a professor to the same chair; *Head v. University*, 5-59.

10. DISSOLUTION; NON USER. Where a corporation is organized for educational purposes, and, to carry out these purposes, the corporation is, by charter, authorized to locate a college at a certain place, to purchase property, real and personal, and such corporation organizes and for a time carries out the purposes of its creation, but, afterward, transfers all its property and ceases to maintain a college, or to perform any of its duties or acts required and authorized by its charter and remains in such condition for nineteen years, a quo warranto will lie, in the name of the state, for its dissolution; *State, ex rel., v. Pipher et al.*, 9-329.

11. —. It is no defense in such action that a suit is at the time pending, brought by the corporation against a grantee of its realty, to recover some of such real estate, which the corporation had granted to such grantee nearly nineteen years prior to that time. *Id.*

12. **DISSOLUTION; EFFECT OF.** Upon the dissolution of such a corporation, in which there are no stockholders and which owes no debts, all its property acquired by purchase for value vests in the state. That acquired by donation reverts to the donors; *People v. President etc.*, 1-161.

COMITY.

1. **THE PRINCIPLE GENERALLY.** Upon the principle of comity, which is a part of the voluntary law of nations, effect is frequently given in one state or country, to the laws of another in a great variety of ways, especially upon questions of contract, rights of property, and rights of action connected with, or depending upon, such foreign laws, without which commercial and business intercourse between the people of different states and countries could scarcely exist; *Thompson v. Waters*, 4-458.

2. **AMONG THE STATES.** Among the states composing the federal union it is the common interest of all to encourage the recognition of those principles of state comity which tend to make us in feeling and in interest one homogeneous people. This comity has been more generally admitted and administered in reference to corporate rights and interests than upon scarcely any other subject. *Id.*

3. **BETWEEN STATES.** There is nothing in the comity which exists between states, that makes it improper for courts of one state to afford a remedy against the property of a corporation which has forfeited its franchises under the laws of another state, such property not being in the hands of a bona fide purchaser, notwithstanding the fact, by the local laws of such other state which created the corporation, its effects are in the hands of a receiver; *City Ins. Co. of Providence v. Commercial Bank of Bristol*, 5-219.

4. **TITLE TO REALTY.** No doctrine is better settled by authority, than that the title to real estate, or immovable property, can only be affected in the mode recognized by the laws of the state within whose territory it is situated. *Id.*

5. **EXERCISE OF FRANCHISES.** No state can create corporations or regulate their powers or authorize the exercise of corporate franchises in another state. It may confer powers, in the nature of a commission, to be exercised anywhere on condition that their exercise be assented to by the state or sovereignty where it may be sought to act. Without such assent, express or implied, such powers are nugatory outside of the state granting them; *Thompson v. Waters*, 4-458.

6. **CONTRACTS.** Foreign corporations may, by comity of nations, make contracts in other states and establish agencies there, unless excluded from so doing, or unless against the policy or interest of the state; *Williams v. Cresswell et al.*, comm'rs, 8-23.

7. **GRANT OF PRIVILEGES.** Comity to a foreign corporation can

not extend to the point of granting it privileges which its charter does not permit it to exercise, and a state in extending its comity may go no further than its pleasure dictates. It may stop short and tolerate but a part of the applicants' chartered rights; *Diamond Match Co. v. Powers*, **10-616**.

8. GRANT OF PRIVILEGES. In the present case, application for a mandamus to compel the register of deeds to permit relator, for its own private use, access to the records of the county for the purpose of making a complete abstract of titles to all the lands in the county, was refused. *Id.*

9. ORGANIZATION OF COMPANY. If, by the law under which a corporation is organized, the corporation has a lien on the stock of a shareholder for a debt due from him to the corporation, such lien is a good defense to an action in another state, against the corporation, by a person to whom the shareholder has transferred his stock; *Bishop v. Globe Co.*, **6-468**.

10. LAWS OF A SISTER STATE. The laws of a foreign state operate beyond the territorial limits of such state *ex comitate* only. The courts of a state where the laws of such foreign state are sought to be enforced, will use a sound discretion as to the extent and mode of the exercise of that comity. Such courts will not permit themselves to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the state which enacted the law and which tend to operate with hardship on her own citizens and subjects; *Rice v. Merrimack Hosiery Co.*, **8-370**.

11. INSTANCE. A creditor of a corporation, created by and existing under the laws of the state of Ohio, filed a bill in a circuit court of New Hampshire, to enforce the individual liability of the stockholders of the corporation. The corporation had no assets in the latter named state, nor did any of its stockholders reside in that state. The bill contained no recital of the remedial process by which the individual liability of stockholders is enforced in Ohio. This court held that comity does not require the courts of this state, in the exercise of a judicial discretion, to give effect here to the statutes of that state. *Id.*

12. JUDICIAL COMITY. When the question is presented, in the supreme court of the United States, whether, under the constitution and laws of a particular state, a company, professing to be a corporation, is legally so, this court will receive as conclusive of the question, the decision of the highest court of the state, deciding, in a case identical in principle, in favor of the corporate existence; *Secombe v. R.R. Co.*, **5-108**.

13. —. The highest courts of a state having decided upon the construction of its statute of limitations, such decisions are binding upon the supreme court of the United States, whatever that court may think of their soundness on general principles; *Tioga R.R. Co. v. Blossburg & Corning R.R.*, **4-265**.

14. JUDICIAL COMITY. In the absence of any positive rule affirming, or denying or restraining the operation of foreign laws, courts presume the tacit adoption of them by their own government, unless repugnant to its policy or interests. Each state, within the limit of the rule, will recognize those corporations enacted into being by the legislatures of other jurisdictions and allow access to its tribunals on all lawful contracts; *Williams v. Cresswell et al.*, comm'rs, 8-23.

COMMERCE.

1. NATIONAL CHARGE. The regulation of commerce is placed within the power of congress, because, being national in its operation, it should be under the protecting care of the national government; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 6-48.

2. ELECTRIC TELEGRAPH. The power to regulate commerce between states is not confined to the instrumentalities of commerce known, or in use, when the federal constitution was adopted; but, it keeps pace with and adapts itself to the new developments of time and circumstance. The electric telegraph has become one of the necessities of commerce, and, as such, it has come under the controlling power of congress. *Id.*

COMMON CARRIER.

1. DUTY. A common carrier owes an equal duty to all, and it can not be discharged if he is allowed to make unequal preferences and, thereby, prevent or impair the enjoyment of the common right; *Messenger et al. v. Pennsylvania R.R. Co.*, 5-542.

2. OBLIGATIONS. The obligations and liability of a common carrier are not dependent upon the contract of parties, though they may be modified and limited by such contract; they are imposed by law, from the public nature of the employment, independent of contract; *Hannibal R.R. v. Swift*, 3-94.

3. WHEN LIABILITY ATTACHES. The liability of the common carrier attaches when the property passes, with its assent, in to its possession. The common carrier is an insurer of the property carried, and it is its duty to see to its proper disposition to insure its safety. *Id.*

4. RIGHT OF ACTION. An action on the case lies against a party who has a public employment, as, for example, a common carrier, for a breach of duty, which the law implies from his employment or general relation; *Southern Express Co. v. M'Veigh*, 4-207.

5. —. Where there is a public employment from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of some thing contrary to an agreement, made in the course of such employment, by the party on whom such general duty is imposed. *Id.*

6. STIPULATIONS IN LIMITATION. A common carrier can not,

even by contract, exempt himself from the exercise of reasonable care; *Adams Express Co. v. Stettaners*, 4-358.

7. **PRINTED RECEIPTS.** The printed receipts, generally used and given by common carriers, containing conditions limiting their liability to a certain sum, unless the value of each package is named and stated therein, will not exempt them from liability for the value of packages lost by the negligence or fraud of themselves or their agents; *Southern Express Co. v. Crook*, 3-118.

8. **RESTRICTION OF LIABILITY.** A distinction exists between the effect of those notices, by a carrier, which seek to discharge him from duties which the law has annexed to his employment, and those designed simply to insure good faith and fair dealing on the part of his employer. In the former case, notice alone is not effectual, without an assent to the attempted restriction. In the latter case notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient; *Oppenheimer & Co. v. U. S. Express Co.*, 5-234.

9. **CONSTRUCTION OF CLAUSES OF RESTRICTION.** The established legal construction of clauses of restriction, in receipts or bills of lading, is not to read them as providing against losses or injuries occasioned by actual negligence. *Id.*

10. **WAIVER OF RESTRICTION.** Because an express company had settled for losses, of bulky goods, without raising the point whether, by the terms of the contract, it was discharged from liability, and, in one instance, paid for a loss exceeding \$50, where there was no valuation, the company was not precluded from questioning its liability in any case which might arise thereafter. *Id.*

11. **WAIVER OF CONDITIONS PRECEDENT TO SHIPMENT.** If the appearance of a package fairly indicates that its value is greater than the sum named in the limitation of the receipt, the carrier will be presumed to waive the necessity of stating a value, unless the attention of the shipper is called to the conditions and the value of the package is required to be given; *South. Express Co. v. Crook*, 3-118.

12. **LIABILITY UNAFFECTED.** The liability of a common carrier is not affected by the facts that the property to be carried is placed in a separate car, selected by the property owner; that the property is loaded or packed by such owner; or, that the owner accompanies it and keeps watch for its safety; *Hannibal R.R. v. Swift*, 3-94; *Harvey v. Rose*, 3-125.

13. **AVOIDANCE OF LIABILITY.** If, at any time, reasonable ground exists for refusing to receive and carry passengers, their baggage or property, for transportation, the company is bound to insist upon such ground of refusal if desirous of avoiding responsibility. *Id.*

14. **LIABILITY, HOW LIMITED.** A special agreement by a common carrier, by which his liability, as such, is to be modified or limited

may be in the form of a special acceptance of the goods by the carrier, as by a unilateral bill of lading or receipt, but to bind the shipper, by its terms, he must expressly assent to it, or it must be brought home to him under circumstances from which his assent is to be implied; *Christensen et al. v. American Express Co.*, **3-504**.

15. APPLICATORY LAWS. A bill of lading, stipulating for exemption of a carrier from liability from losses by fire, was drawn in Connecticut, where such exemption is lawful. The goods were shipped to Iowa, where carriers may not limit their liability. The goods were destroyed by fire, without the fault of the carrier. Held, that the limitation was valid and plaintiff had no recovery; *Talbott v. Merchants' Despatch Transportation Co.*, **5-372**.

16. CARRIER'S RIGHT. As the carrier incurs a heavy responsibility, he has a right to demand, from his employer, such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust. Therefore, a limitation of liability to the sum of \$50, unless the just and true value of the box, package or thing, delivered to be carried, is stated, is reasonable and consistent with public policy; *Oppenheimer & Co. v. United States Express Co.*, **5-234**.

17. CONCEALMENT OF VALUE. A party forwarded jewelry, valued at \$3,800, in a box, by express, taking a receipt which was filled up by the party's own agent, and which disclosed the fact that the company should not be liable for any loss or damage of any box, package or thing, for over \$50, unless the just and true value thereof was therein stated, the blank space for the value being filled with a mark indicative of no value, and in consequence thereof was charged a less price or premium than would otherwise have been exacted, it was held, that independent of the qualifying words in the receipt, the court would be inclined to exempt the company from liability, on the ground of want of good faith, in not disclosing the value of the goods. *Id.*

18. EXTRA-TERRITORIAL DEFAULTS. Carriers are responsible only to the extent and in conformity with the law of the state, where the contract is made, or the duty undertaken. In this there is no difference whether the action be in form *ex contractu* or *ex delicto*; *N. Orl. J. & G. N. R.R. Co. v. Wallace*, **5-490**. See EXPRESS COMPANY; FERRY COMPANY; RAILROAD COMPANY; TELEGRAPH COMPANY.

COMMON LAW.

1. HOW FAR ADOPTED. The courts of this state are not required, by our statute adopting the common law of England, to enforce local customs of that realm, as it does not prescribe local customs and statutes as a rule of action in this state. On the

contrary, they are excluded; *Hannibal & St. Joe R.R. Co. v. Crane*, for use of etc., **9-111**.

2. JUDGMENT AFTER DEATH. By the common law and in the absence of any statutory provision on the subject, a judgment against a dead person, whether natural or artificial, is absolutely void. The fact that service may have been obtained, or that suit was commenced before the death, makes no difference. This rule of the common law is in force in Illinois; *Life Assoc. v. Fassett*, **9-119**.

COMPENSATION.

1. WITHOUT AGREEMENT. An officer of a corporation can not recover compensation for the performance of the usual and ordinary duties of his office, unless it has been so specially agreed. In such case he can not recover on a quantum meruit; *Citizens N. Bk. v. Elliott*, **6-571**.

2. AGREEMENT BEFORE ORGANIZATION. The founders of a corporation, or members of it, can not by agreement, or converse, bind the corporation they afterward form to the payment of salaries to officers. The fact that services are performed after organization is immaterial to change the rule of non payment for such services, save on contract made by the corporation. *Id.*

3. DIRECTORS. The president and directors of a corporation, occupying the position of trustees of the fund and property of the corporation, are not entitled to any compensation for ordinary services, as such officers, unless such compensation be fixed by by-law or resolution of the board of directors, passed before the services are performed; *Gridley v. Lafayette etc. Ry. Co.*, **5-260**.

4. DIRECTOR AS TREASURER. Where a director is appointed to act as the corporate treasurer, no provision being then or previously made, by by-law or resolution, for his compensation, it will be presumed that the fulfillment of the duty was regarded as a part of his duty as a director, and he will have no right to claim pay for the same. A subsequent allowance of such a claim, in his favor, will not warrant a recovery; *Holder v. Lafayette etc. Co.*, **5-258**.

5. EXTRAORDINARY SERVICES. For services such as do not pertain to the particular office one holds, compensation may be recovered, although there be no official agreement; *Citizens N. Bk. v. Elliott*, **6-571**.

6. —. A president or director of a corporation performing extraordinary duties, not pertaining to his office, may recover compensation for such; *Gridley v. Lafayette etc. Ry. Co.*, **5-260**.

7. —. Where one not connected with the management and disposal of corporate property performs services for the company, or where directors are employed, as agents, to perform duties disconnected from their office, and no rule of public policy is thereby

violated, compensation for such services may be allowed and recovered; *Holder v. Lafayette etc. R.R. Co.*, 5-258.

8. UNLAWFUL ORDER TO PAY. To audit an account for ordinary services of the president and to draw an order to pay the same, no compensation having been provided for before service rendered, is unlawful; no recovery can be had thereon; *Gridley v. Lafayette etc. Ry. Co.*, 5-260.

9. CONTRACT TO PAY. A contract in regard to compensation measures both rights and obligations. The agent alone can not change it, notwithstanding the services may have been of incalculable benefit to the principal. His possession and control of the funds of his principal give him no added rights. A failure to return all funds and properties of such principal in excess of the stipulated compensation, gives to such principal a clear and undisputed right of action. This elementary rule is not changed by reason that the principal is a corporation and the agent its chief executive and managing officer. In such a case a contract to act as agent, gratuitously, is binding; *Nat. Bk. v. Drake*, 9-340.

10. EXECUTIVE OFFICER. In the absence of positive restrictions, where no salary is prescribed, one appointed to an executive office—as the office of cashier—is entitled to a reasonable compensation for his services. The directors are empowered to fix such salary after the expiration of the term of office; this, although such appointee is, also, a director, and continues to be such while holding the independent office. *Id.*

CONDEMNATION; see EMINENT DOMAIN.

CONFLICT OF LAWS.

1. FEDERAL AND STATE LAW. Commerce is subject to the regulation of congress. A state statute granting to a corporation—in this case a telegraph company—an exclusive right to construct and operate necessary works, conflicting with an act of congress, upon the same subject matter, is inoperative as to any corporation which is entitled to the privilege of the act of congress; *Pensacola Tel. Co. v. W. Un. Tel. Co.*, 6-48.

2. CONFLICT OF LAW. Decisions of the supreme court of Pennsylvania are not of binding authority on a state court in the construction of a statute of the state; especially when such construction is at variance with prior decisions of such court; *Penn v. Bornman et al.*, 9-134.

3. —. While corporations can exercise no corporate powers within the limits of another state than that of their creation, without the consent of the latter, yet, when that consent is given, the amendment of the charter of the company, by the state creating it, by a provision which conflicts with some law or constitutional provision of the state licensing the corporation, can not destroy the

validity of the amendment; *City of Covington v. Cov. & Cin. Bridge Co.*, 5-388.

4. CONFLICT OF LAW. A bill of lading stipulating for exemption of a carrier from liability from loss by fire, was made in Connecticut, in which state such exemption is lawful. The goods were shipped to Iowa, where carriers may not limit their liability. The goods were destroyed by fire, without the fault of the carrier. The limitation was valid and plaintiff could not recover; *Talbott v. Merch. Disp. Transp. Co.*, 5-372.

5. —. Where there is a conflict of applicatory laws, the parties are presumed to have made their agreement with reference to that statute which is most favorable to its validity and performance. *Id.*

CONSIGNEE.

1. RECIPROCAL DUTIES. The carrier's duty to deliver and that of the consignee to receive are reciprocal; *Adams Ex. Co. v. Darnell*, 3-289.

CONSOLIDATION.

1. GRANT OF POWER. The power conferred on a railroad company, by its charter, to form a union or consolidation with another company, is a contract between the state and the corporation, and can not be impaired by subsequent legislation; *Zimmer v. State*, 5-139.

2. IS ACCEPTANCE OF CHARTER AMENDMENTS AUTHORIZING. The very fact of the consolidation made by companies, pursuant to and by virtue of an act of the legislature, which declares the effect upon the rights and liabilities of the parties to such consolidation, of itself, implies, as between the companies, the assent to the transfer and the acceptance of the rights and liabilities, as declared by the act; *Miller et al. v. Lancaster et al.*, 4-170.

3. CONDITION PRECEDENT. By compiled laws, 1857, § 1996, of Michigan, an election of directors of the consolidated company was made a condition precedent of the acquisition of the rights and franchises of the original companies by the consolidated corporation; *Mansfield, Coldwater & Lake Michigan R.R. Co. v. Drinker*, 5-466.

4. —. By the same act the filing of a duplicate of the agreement of consolidation with the secretary of state, after it shall have been confirmed by the stockholders, was made a condition precedent to a merger of the original corporations, and before such filing no valid action as a consolidated company could be taken, and any prior attempted election of directors would be without authority and of no effect. *Id.*

5. CONSTRUCTION OF STATUTE. The act of the legislature of the state of Illinois, of February 10, 1853, incorporating the Rockton and Freeport Railroad Company, empowered said company, in

the event of a consolidation of its stock with that of another corporation outside of said state, to place the control of said stock under the control of the board of directors of the foreign corporation; *Racine & Mississippi R.R. Co. v. Farmers Loan & Trust Co.*, 1-441.

6. QUALIFICATION OF GRANT. Where an act authorizing the consolidation of two or more companies, provides the new or consolidated company shall have all the powers, privileges and immunities of the original companies, this must be taken with the qualification that it should have been so far as they can be exercised or enjoyed by it, with its different officers and distinct constitution; *R.R. Co. v. Maine*, 6-37.

7. EFFECT OF PRIOR LEGISLATION. Where two or more corporations are consolidated under an act of incorporation, and the constituent companies become merged into the new or consolidated company, the enactment authorizing the consolidation becomes its act of incorporation. Wherefore, if there be an act providing, as to all corporations created after its passage, that their charters shall be liable to be amended, altered or repealed, at the pleasure of the legislature, and the act for consolidation was thereafter passed, and it contains no express limitation or provision to the contrary, such prior act is to be considered as embodied therein, and the consolidated company will be subjected to the condition as to amendment, etc. *Id.*

8. JUDICIAL COGNIZANCE. An act of legislature passed authorizing the consolidation of two corporations, the consolidated company to have and possess all the rights, powers, privileges, immunities, advantages, franchises and property of the constituent company merged into it, subject to all the duties, liabilities, obligations and restrictions resting upon either and both of the constituent companies. The consolidated company would be liable for the debts and liabilities of the merged corporation if the consolidation authorized took place. In suit to enforce an indebtedness of the merged company against the consolidated corporation, the court can not take judicial notice of the fact that the companies accepted the act and consummated the consolidation. Proof is requisite; *Southgate v. Atlantic & Pac. R.R. Co.*, 8-144.

9. UNDER A DOMESTIC LAW. The Lake Shore and Michigan Southern Railway Company organized, under a statute of New York (Laws of 1869, ch. 917), by the consolidation of various foreign and domestic railroad companies. It is a domestic, not a foreign corporation, and, therefore, a statute (Laws of 1842, ch. 165) to compel transfer agents of foreign corporations to exhibit lists of their stockholders has no application to it; *Sage et al. v. Lake Shore & Mich. South. Ry. Co. et al.*, 8-500.

10. DISSOLUTION; EFFECT. The consolidation of two companies does not necessarily work the dissolution of both and the creation of a new corporation. Whether such be its effect de-

pend upon the legislative intent manifested in the statute under which the consolidation takes place; *Central R.R. & Banking Co. v. Georgia*, 5-126.

11. NOT A DISSOLUTION. A union or consolidation of a defendant corporation with other corporations, under a law which continues its liabilities, is not such a dissolution of the corporation as will abate an action brought before consolidation was effected; *East Tennessee & Georgia R.R. Co. v. Evans*, 4-186.

12. MERGER; EFFECT OF. When, by consolidation, one corporation becomes merged in the consolidated company, its distinct corporate existence ceases, except so far as such existence may be necessary for the protection of its creditors, or mortgagees, or those of the new corporation; *R.R. Co. v. Maine*, 6-37.

13. IS RE-INCORPORATION. An act authorizing the consolidation of two, or more, corporations is an act of incorporation. The companies organizing under it are dissolved, save as the law suffers them to exist for some special purposes, and the new organization is a new and distinct corporation; *State v. Maine Cent. R.R. Co.*, 7-284.

14. INCORPORATION BY. A new corporation may be as readily created by the union of two or more corporations as by the union of individuals. Its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration; *R.R. Co. v. Maine*, 6-37.

15. EXISTENCE MERGED. Where two corporations acting under legislative authority, become consolidated, the effect of such consolidation is to terminate the existence of the original corporations, to create a new corporation, to transmute the members into the latter and transfer the property, rights and liabilities of each old company to the new one; *Fee v. N. O. Gas Light Co.*, 10-486.

16. WANT OF CONSIDERATION. Where two corporations unite their property and form a new corporation, no money being paid or article of value passing between the parties as a consideration for the property of the old corporations, the new corporation can not avail itself of the rule for the protection of bona fide purchasers for value, but it takes the property subject to existing liens; *Key City*, 4-239.

17. MERGER OF POWER. A consolidation of two corporations extinguishes the original corporations and merges the powers of both into a new one; *Indianapolis, Cincinnati & Lafayette R.R. Co. v. Jones*, 1-351.

18. MERGER OF RIGHTS, ETC. Where consolidation and merger of corporations are made, under legislative sanction, and the transfer of rights and properties and assumption of liabilities, between the old and new companies, are effected, the new company stands in the stead of the old companies and may enforce the rights of the old companies and be subjected to their liabilities; *Miller et al. v. Lancaster et al.*, 4-170.

19. **SPECIAL PRIVILEGES.** One company, as a constituent of a consolidated company, being possessed of a certain special privilege, the act of consolidation does not confer such privilege upon another company of the consolidation; *Cent. R.R. & Banking Co. v. Georgia*, 5-126.

20. **SUCCESSORSHIP.** Where two corporations are consolidated, the new corporation is the successor of each of its constituents and it takes all the franchises and properties of each. At the same time it assumes all their debts and obligations and, therefore, is bound by an unrecorded mortgage made by one of them, of which it had no notice; *Miss. Valley Co. v. Chicago, St. Louis & New Orleans R.R. Co.*, 8-75.

21. **SUCCESSION BY.** A corporation formed by consolidation succeeds to all the rights conferred by charter on the several constituent companies; but, it becomes, by the act of consolidation, invested with no greater, or other rights than were possessed by the constituent companies forming the consolidated organization; *Ruggles v. People of State of Illinois*, 6-428.

22. **SUCCESSION TO RIGHTS.** A provision in the charter of a railroad company, exempting its officers, agents and servants from military and road duty and serving on juries, was not a mere personal privilege conferred upon the class of persons described, but constituted a valuable right in the company, to which another company, formed by a consolidation between it and another company, would succeed; *Zimmer v. State*, 5-139.

23. **NATURE OF RIGHTS ACQUIRED BY.** An agreement of the consolidated corporation to pay all the debts, obligations, and responsibilities of a constituent company, coupled with the acquisition, in the same transaction, of all the property out of which creditors should be paid and the subsequent dissolution of the debtor company, to which the promise was made, will create a lien, in favor of the creditors, on the property of the constituent debtor company, superior to the lien of a subsequent mortgage executed by the consolidated company; *Montgomery & West Point R.R. Co. v. Branch Sons & Co.*, 6-136.

24. **SUCCESSION TO POWERS, ETC.** When a new corporation is formed out of two or more previously existing corporations, and, by the act creating it, is to have the powers, privileges and immunities possessed by each of the corporations, whose union constitutes such new corporation, the new corporation will have the privileges, powers and immunities which they all — that is, every one of them; all — had; it will not have such special powers, privileges and immunities which some had and some did not have; *State v. Maine Cent. R.R. Co.*, 7-284.

25. **POWERS ACQUIRED BY.** Where a railroad corporation of Illinois is consolidated with a similar corporation of another state, in conformity with the laws of that state, the new com-

pany so created will be clothed with all the rights, privileges and powers conferred by the laws of Illinois upon the old corporation of that state; *Cooper et al. v. Corbin et al.*, **9**-192.

26. **RIGHT TO SUE, ETC.** A railroad company, formed by the consolidation of two companies, succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement; *Paine et al. v. Lake Erie & Louisville R.R. Co.*, **1**-386.

27. **RIGHTS AND PRIVILEGES.** Where, by consolidation, two or more corporations form a new or consolidated company, the latter, unless restricted by the law under which the consolidation takes place, succeeds to all the rights, privileges, immunities and franchises of the several companies forming it; *Zimmer v. State*, **5**-139.

28. **RIGHTS AND BURDENS OF EACH COMPANY.** Where railroad companies are amalgamated or consolidated, unless the contrary be expressly stated in the act authorizing the amalgamation, each of the lines united will be held, respectively, with the rights, privileges and burdens originally attaching thereto; *Tomlinson v. Branch*, **4**-249.

29. **EXISTING LIABILITIES.** The consolidated corporation must, for the purpose of answering for the liabilities of the old corporations, be deemed the same as each of its constituents, and liable for their debts, which may be enforced against it as if no change had been made; *Indianapolis, etc. R.R. Co. v. Jones*, **1**-351.

30. **RIGHTS AND LIABILITIES UNDER.** When a new corporation is formed, under authority of the state, by the amalgamation of two or more distinct corporations into one, such new corporation succeeds to all the faculties and rights of the several components and must, as a necessary consequence, be subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected; *Chic., R. I. & P. R.R. Co. v. Moffit*, **5**-330.

31. —. After the consolidation of companies, the new company, formed by the consolidation, becomes liable to perform the duties required of the constituent companies. If no part of the franchise be reserved to either of the old companies, they will not be liable for the performance of duties devolving upon the new or consolidated company; *Peoria & Rock Island Ry. Co. v. Coal Valley Mining Co.*, **5**-225.

32. **AS TO CONVERSION OF BONDS.** Such consolidation extinguishes a previously existing agreement for the conversion of bonds, into stock of the constituents, at the option of the holder of the bonds; *Tagart et al. v. N. Cent. Ry. Co.*, **3**-362.

33. **AS TO ISSUE OF STOCK.** The lawful consolidation of two or more railroad companies, causes each of the constituents to cease

to exist as a private corporation so far as respects its power to create or issue certificates of capital stock. *Id.*

34. STOCK SUBSCRIPTIONS. Quære, whether subscriptions to the stock of a corporation which has become merged into a new consolidated company, can be assigned by the latter; *Rodgers v. Wells*, 6-654.

35. ASSESSMENT OF STOCK. A corporation formed by the consolidation of two, or more, corporations can not make valid assessments upon subscriptions to the stock of one constituent company, before corporate existence has been completed by compliance with all statutory requirements; *Peninsular Ry. Co. v. Tharp*, 5-465.

36. RECOVERY OF ASSESSMENTS. It is essential to a recovery by a consolidated corporation, in an action upon assessments upon a subscription to the capital stock of one of the original corporations, on the ground of a right by succession under the statute, that a consolidation strictly conforming to the statute authorizing it be proved; *Mansfield, Coldwater & Lake Michigan R.R. Co. v. Drinker*, 5-466.

37. RIGHTS OF STOCKHOLDERS. While the law authorizing the consolidation provided that it might be effected by action of three-fifths of all the stockholders, it did not confer upon them power, without his consent, to transfer the rights of any stockholder to a third person. As holder of stock in one of the original companies, he became entitled to an equivalent in stock of the new company; *Fee v. N. O. Gas L. Co.*, 10-486.

38. —. Where, in effecting such consolidation, there was an attempted transfer of certain shares of stock to one A. as representative of the stockholders of the new company, held, that plaintiff was not estopped to demand his share of stock in the new company, and inasmuch as his claim was not for any particular stock, he need not make such unauthorized transferee a party to his suit. *Id.*

39. SPECIAL EXEMPTIONS LOST BY. When a corporation is, by its charter, specially exempted from some general burden, as of taxation at a greater rate than specified, and by consolidation with another company, which is not so exempted, and by its merger into such consolidated company it incapacitates itself from the performance of those duties, as of reporting its earnings, as a distinct corporation, upon which its immunity is to be determined, the immunity, as to it, is lost; *R.R. Co. v. Maine*, 6-37.

40. EXEMPTION FROM TAXATION. When two, or more, corporations with a special immunity from general taxation, the amount of such taxation being dependent upon certain precedent acts to be done by such corporation, thus to be exempted, are incorporated (by consolidation, or otherwise), into a new corporation which is unable and is not required to do, or perform, the acts which must precede such special taxation, the new corporation, thus created, can not claim the special immunity belonging to the

corporations out of which it is composed; *State v. Maine Cent. R.R. Co.*, 7-284.

41. **EXEMPTION FROM TAXATION.** Exemption from liability to any greater tax than one-half of one per cent. of its net annual income having been conferred, by its charter, on one company, of two which consolidated, it is not in the power of the legislature to impose an increased tax after consolidation; *Cent. R.R. etc. Co. v. Georgia*, 5-126.

42. **CORPORATION DE FACTO; TRANSFER OF CORPORATE RIGHTS.** It is not enough to authorize a recovery, in such an action, that the consolidated company be shown to be a corporation *de facto*, and entitled, as such, to enforce contracts against parties who have dealt with it; to acquire the rights of the original corporation in its contract with subscribers to its stock, otherwise than by assignment, it is essential that the statutory requirements of a transfer by succession be complied with, at least in the absence of any participation by such subscriber, as a stockholder, in the action of the new or consolidated corporation by virtue of his previous relation as stockholder in the original corporation, such as would estop him from disputing the consolidation; *Mansfield, etc., R.R. Co. v. Drinker*, 5-466.

43. **OF CORPORATIONS IN DIFFERENT STATES.** The consolidation of the stock of a railroad company, created by the laws of the state of Wisconsin, with that of one created by the laws of the state of Illinois, does not constitute the corporations thus consolidating one corporation of both states, or of either, but the corporation of each state continues a corporation of the state of its creation, although both corporations are managed by one board of directors as one body; *Racine & M. R.R. Co. v. Loan etc. Co.*, 1-441.

44. **EFFECT OF, AS TO CITIZENSHIP.** Two corporations, organized and existing as such under the laws of two different states, lawfully consolidating become one; nevertheless in the state of the organization of each constituent the consolidated company is but a corporation of that state; *Muller v. Dows*, 6-8.

45. **RIGHTS AND PRIVILEGES IN SEVERAL STATES.** A railroad corporation was created under an act of the state of Maryland, of 1831, and a supplement thereto. The corporation was authorized to construct and maintain a railroad from a point on the Delaware and Maryland state line to a point on the Susquehanna river, in Maryland. By one section of the act it was provided that the shares of the capital stock of the company should be exempt from the imposition of any tax or burden by the states assenting to the act, except upon that portion of the permanent and fixed works of the company which might be within the state of Maryland. A second corporation was created, by an act of the state of Delaware, in 1832, and its supplement, with authority to construct and maintain a railroad from a point on the boundary

line of Pennsylvania and Delaware to the city of Wilmington and thence toward the Susquehanna, in the direction of Baltimore. These two companies were consolidated, in 1835, under acts of the states of Delaware and Maryland. The act of Delaware authorizing the consolidation, on her part, provided that "the holders of the stocks of the two companies should, when consolidated, hold, possess and enjoy all the property, rights and privileges and exercise all the powers granted to and vested in the companies, or either of them, by that law or any other law or laws" of that state or of Maryland. The act of Maryland authorizing the union of the companies, on her part, contained a similar provision. Held, that the purpose of the two provisions was to vest, in the new company, the rights and privileges which the original companies had previously possessed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed and the rights and privileges in Delaware which the Delaware company had there enjoyed; and not to transfer to either state and enforce therein the legislation of the other. The new company stood, in each state, as the original company had previously stood in that state, invested with the same rights and subject to the same liabilities; Delaware R.R. Tax Cases, 5-30.

46. MORTGAGE BY CONSOLIDATED COMPANY. Where, after such a consolidation, the name of the Wisconsin corporation was, by the act of the legislature of the state of Illinois, also made the name of the Illinois corporation, and a mortgage was made in the corporate name by the officers of the consolidated company, conveying the property of the Illinois corporation, the mortgage should be held legal and valid as the sole and separate mortgage of the Illinois corporation. *Racine & M. R.R. Co. v. Loan etc. Co.*, 1-441.

47. —. And, when the consolidated corporation thus created afterward consolidated with another corporation created by the state of Illinois, its name being changed by legislative enactment to that of consolidated corporation, after which a mortgage was executed conveying the entire property held by the company in the state of Illinois, it was held, that while the contract for consolidation with the third company may have been invalid, that could not affect the validity of the mortgage as to that portion of the property not owned by such corporation at the time of the consolidation. *Id.*

48. ESTOPPEL. In a suit to foreclose a mortgage executed by a consolidated railroad company, it will not be permitted to question the validity of its contract of consolidation. *Id.*

49. MORTGAGE; DEFECTIVE CONSOLIDATION. Where corporations created respectively by the laws of Wisconsin and Illinois consolidate, but in the contract of consolidation fail to pursue the terms of their charters, and the contract of consolidation is sub-

sequently confirmed by an act of the legislature of the state of Illinois, the corporate existence of the corporation is thereby recognized as a body corporate of the state of Illinois. A mortgage subsequently executed in the name borne by all of the consolidated corporations, by a common board of directors, conveying the property of the corporation in the state of Illinois, is as valid as a mortgage of the Illinois corporation. *Id.*

50. FAILURE OF ATTEMPTED CONSOLIDATION. Where two or more turnpike companies attempted a consolidation, which consolidation was afterward declared by the supreme court illegal, there was no ground for the forfeiture of the franchise of one of such companies, by reason of a non user of its separate corporate rights during the period of such attempted consolidation; *State, ex rel. v. Crawfordsville, etc., Turnpike Co., 10-343.*

51. —. The rights, privileges and franchises of such corporations should not be declared forfeited, and they ousted and excluded therefrom except for solid, weighty and cogent reasons, for the violation of a positive and prohibitory statute, and not of a statute whose provisions are permissive and apparently directory, and never upon merely technical grounds. *Id.*

52. TRUSTEE. A person having the management and control of consolidated corporations for the security and protection of a mortgagee is a trustee, not only for the mortgagee, but for the mortgagor corporations; *Racine & M. R.R. Co. v. Loan, etc., Co., 1-441.*

53. —; PURCHASE BY. If a person occupying such a relation become a purchaser of the property of the corporation at a foreclosure sale of the property under a second mortgage, he may be required to surrender the property purchased to the mortgagor corporation, upon being reimbursed the amount of his bid, with interest thereon. *Id.*

54. —; RENTS AND PROFITS. Such a trustee should be held to account for the earnings of the property, while it is in his possession. *Id.*

55. —; REDEMPTION. In such case, the account must be stated, and a reasonable time allowed after the balance is ascertained, to the mortgagor corporation in which to redeem. *Id.*

56. SUIT, HOW BROUGHT. Where a company, having executed its promissory note, becomes consolidated with another company, and the company thus formed assumes a new name, the constituent corporation, maker of the note, may be sued by the new name thus assumed, and it will be estopped to deny the name by which it is sued; *Columbus, Chi. & Ind. Ry. Co. v. Skidmore, 5-243.*

57. EVIDENCE OF. In a suit (in Illinois), against a corporation, formed by the consolidation of two or more companies, upon a promissory note executed by one of the constituent corporations, copies of the articles of consolidation on file in the office of the

secretary of state, duly certified by that officer and authenticated by his seal of office, are competent evidence to prove the consolidation, the same as the original articles would be. *Id.*

58. NOTICE OF MEETING. When it does not appear notice of a legal meeting to act upon consolidation was given, proof of perfected consolidation is not made; *Rogers v. Wells*, 6-654.

59. RECOVERY FOR TORT. During August, 1879, the Kansas Pacific Railroad Company owned and operated a line of railway through the city of Lawrence. While so owning and operating its railroad one of its trains ran over and injured the plaintiff. In January, 1880, the Kansas Pacific Railroad Company, the Denver Pacific Railroad and Telegraph Company and the Union Pacific Railroad Company entered into an agreement of consolidation; by which agreement they formed, or attempted to form, the Union Pacific Railroad Company, and to such company, by their articles of consolidation, transferred all their respective properties. The articles of consolidation expressly stipulated that the consolidated company should not be liable for the individual debts of the constituent companies, but that such constituent companies should continue in existence for the purpose of adjusting all claims and demands, and, also, that the consolidation should not prevent the enforcement of any valid obligation or liability of either constituent company against the properties so transferred by such constituent company. The supreme court of Kansas held, that before plaintiff could maintain an action against the consolidated company, whether such articles of consolidation were valid and such consolidated company a legal corporation, or not, or the articles of consolidation void and the consolidated company a mere irregular association, he must, by an action against the Kansas Pacific Railway Company, the party who did the injuries, convert his unliquidated claim into a liquidated demand, and have both the fact and the amount of the Kansas Pacific Company's liability adjudicated; *Whipple v. Union Pacific R.R. Co.*, 9-334.

60. AS TO JUDGMENT CREDITOR. A judgment creditor of a consolidated company, without actual notice, does not stand in like predicament with the consolidated company in respect to an unrecorded mortgage of one of the constituent corporations. As to him, although at common law a mere volunteer, taking only the rights of his debtor, the effect of the registry law is to postpone such mortgage to his rights; *Mississippi Valley Co. v. Chicago, St. Louis & N. Orleans R.R. Co.*, 8-75.

61. —. At common law, in case of natural persons, the death of defendant in error did not abate the writ, but the case proceeded to judgment and, afterward, that judgment was revived by scire facias. The statute of Mississippi, to bring in parties to pending suits, relates only to natural persons. Where a suit is pending against a corporation, at the time of its consolidation with another company, the plaintiff has a right to treat it as continuing

to have a separate existence for the prosecution of his action against it. The action of the legislature authorizing, and the act of the corporation, in effecting the consolidation can not defeat or prejudice a plaintiff's rights in pending suits. As to such, the corporation exists for the purpose of judgment, not losing, as to them, individuality or identity; *Shackelford v. Mississippi Cent. R.R. Co.*, 8-31.

62. **CREDITOR'S LIEN.** Where two, or more, corporations consolidate, one or more of the constituent companies transferring its property and effects, out of which creditors should be paid, to another of the companies forming the new corporation, in consideration that the latter admits to its membership the stockholders of the former, the consolidated company can claim nothing in capacity of innocent purchaser for value without notice; *Montgomery & West Point R.R. Co. v. Branch Sons & Co.*, 6-136.

63. **QUESTION IN A SUIT.** Where one declares on an assignment of stock subscriptions, made by a consolidated corporation, it is essential he should show a perfected consolidation of the constituent companies. In the absence of proof thereof, showing a substantial compliance with the law authorizing consolidation, no recovery can be had on the thing assigned; *Rodgers v. Wells*, 6-654.

64. **AVERMENT OF.** When one sues upon a chose in action, assigned by a consolidated corporation, evidence which tends to prove a direct assignment by a constituent corporation, which was the prior holder of the thing in action, is of no avail as a basis of recovery. *Id.*

CONSPIRACY.

1. **TO DESTROY FRANCHISES.** A conspiracy, with a portion of the directors of a corporation, to suspend and destroy the business and franchises of the company, as, in this case, by suspending the publication of a newspaper, for the benefit of a rival establishment, is a corporate wrong, for which the appropriate remedy is a suit brought in the corporate name; *Talbot v. Scripps et al.*, 5-477.

CONSTITUTIONAL LAW.

1. **CHARTERS ARE CONTRACTS.** Acts of incorporation are contracts within the meaning of the provisions of the federal constitution and the constitution of Kentucky prohibiting the enactment of laws impairing the obligation of contracts; *Hamilton v. Kutte et al.*, 1-549.

2. **VOID CHARTER AS A LICENSE.** Notwithstanding a legislative act creating a corporation may be void, as being obnoxious to a constitutional provision prohibiting such creation by a special act of the legislature, it may operate as a legislative license, or authority, to the parties named in the act and their associates to do that which the language and obvious intent of the act authorizes

them to do — as to set up and carry on a lottery for specified purposes — so far, at least, as to constitute a defense to an indictment punishing persons setting up and carrying on lotteries; *Brent v. State*, **3**-111.

3. INVALID ORGANIZATION; CURATIVE ACT. The legislature has the same power to ratify and confirm an irregular organization of a corporate body, that it has to create a new one; *Mitchell v. Deeds*, **1**-460.

4. STATUTES CONSTRUED. By the act of the legislature of Illinois of February 14, 1857, confirming the consolidation before then entered into, between the Savannah Branch Railroad Company and the Racine and Mississippi Railroad Company, the corporate body which was organized in accordance with the act of consolidation, became legal, notwithstanding such organization may have been irregular. *Id.*

5. IMPOSITION OF NEW BURDENS UPON STOCKHOLDERS. A railroad company, defendant, having constructed a part of its road, was largely in debt, and without means to complete its work. The company accepted an act authorizing the issue of bonds in such case, which act provided for the liability of the individual stockholders upon the bonds issued. At a stockholders' meeting, those present unanimously voted an assessment on the whole stock of the company for the payment of the bonds. Plaintiff did not take part in these proceedings, and suit having been brought to recover the amount of an assessment levied on his paid up stock, it was held, that the act of the legislature (of May 3, 1852), in so far as it undertakes to impose individual liability, not imposed by the charters of corporations, or the laws under which they were organized, is a law impairing the validity of the stockholder's contract with the company and, therefore, unconstitutional; *Ireland v. Palestine, Braffitsville, New Paris & New Westville Turnpike Co.*, **4**-1.

6. POLITICAL TRUSTS. Constitutions provide for the selection of political agencies. The powers of government are, by the provisions of such constitutions, given to these; but these powers are generally so distributed that no one class is permitted to exercise any of the powers conferred upon either of the others. These political agencies, commonly called branches of government, are the representatives of the people, in their sovereign capacity; and, the powers thus conferred upon them, so far as they are essential to the attainment of the objects and purposes of the government, are held, by them, in trust, for the people, and it is not in their power to delegate them to others, or to contract, or to barter them away; *Ward, rec'r, v. Farwell et al.*, **6**-490.

7. CREATION OF CORPORATION. Each state has plenary power to create a corporation; but no state can create a part of the elements of a corporation and rely upon the other to complete it and, thus,

produce a being which has not received full life from either ; *Newport & Cin. Bridge Co. v. Woolley*, 7-184.

8. CREATION OF CORPORATION. A constitutional provision which provides that corporations may be formed under general law, but not by special act, except for municipal purposes, does not apply to acts of incorporation to enable operations to be carried on in specified localities, which operations can not, in the nature of things, be elsewhere carried on ; *Att'y Gen., ex rel. Nelson, v. M'Arthur et al.*, 6-606.

9. PROHIBITION AGAINST SPECIAL FRANCHISES. The constitutional prohibition (of Illinois) as to the grant of any special or exclusive privilege, immunity or franchise, is a limitation upon the power of the general assembly and can not be construed as a limitation upon the power of a municipal corporation to designate streets and fix the conditions upon which a railway company, organized under a special charter, previously granted, may construct and operate its road upon such street ; *Chicago City Ry. Co. v. People*, *ex rel. Story*, 5-310.

10. LIMITATIONS. Corporations, in the state of California, except for municipal purposes, must be formed under general laws and can exercise no powers except such as are conferred by such general laws. The legislature can not confer on such corporations any powers or grant them any privileges by special act ; *City and County of San Francisco v. Spring Valley Water Works*, 5-153.

11. —. The legislature is restricted not only from creating a business corporation by special act, but, also, from conferring any right of franchise by such an act. The true intent is that no corporate right or power shall be derived from any other than a general law. *Id.*

12. INSTANCE. An act which grants, to individuals and their successors, powers and privileges and imposes certain duties and obligations upon them, and then provides that the act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation, under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed, and such an act is an attempt, on the part of the legislature, to confer powers and privileges upon a corporation by special act. When such persons organize themselves into a corporation under the general laws the corporation possesses no powers or privileges except such as are conferred by the general law. *Id.*

13. —; CHANGE OF NAME. It seems that a constitutional provision, prohibiting the creation of private corporations by special enactment, does not prohibit the change of the name of an existing corporation by such legislation ; *Pacific Bank v. De Roe*, 1-246.

14. LEGISLATIVE POWER. Whenever a legislature has a right to accomplish a certain result, and that result is best attained by

means of a corporation, it has the power to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose; *Slaughter House Cases*, 5-1.

15. AS TO MONOPOLIES. The parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country have, from time immemorial to the present day, continued to grant, to persons and corporations, exclusive privileges, that is, privileges denied to other citizens, and which come within any just definition of the word "monopoly." *Id.*

16. MONOPOLY. The power, in the legislature, to grant exclusive privileges is not forbidden to be exercised by the thirteenth and fourteenth amendments to the constitution of the United States. *Id.*

17. —. The authority of the legislature of a state extends to the passage of statutes granting exclusive privileges, unless such legislature be restrained in the exercise of such power, by some provision of the constitution of the state or of the constitution of the United States. *Id.*

18. EXCLUSIVE RIGHT TO MANUFACTURE GAS. The legislature of the state of Wisconsin may, of its prerogative, confer upon a private corporation the exclusive right and privilege to manufacture and sell gas, to erect works and apparatus therefor, and to use the streets, lanes, etc., for the purpose of laying pipes and conducting the manufactured article to consumers within the limits of a municipal corporation; *State of Wisconsin v. Milwaukee Gas Light Co.*, 4-234.

19. EXCLUSIVE RIGHT, SUBJECT TO REPEAL. A legislative grant to a gas company of the exclusive right to lay gas pipes in the streets of a city is not obnoxious to objection as an unconstitutional franchise, for the reason that it is not limited to any particular term of years. If it should become oppressive in the future the legislature may revoke it. *Id.*

20. ONE SUBJECT IN A STATUTE. An act to revive and amend the charter of a company and to authorize certain towns to aid in the construction of its railroad was passed. It provided to revive and continue in force the prior acts, and then that certain towns named might subscribe for stock in the corporation. It proceeded to require an election by the voters as a pre-requisite of the subscription which was, only, to be made when a majority of the votes in the town was cast in its favor; it then prescribed the method of ascertaining the sense of the voters, and for the election of directors in the company, to represent the town's shares, if it was resolved to subscribe. It was objected that this act was obnoxious to constitutional objection, as embracing more than one subject. Held, that it embraces but one general matter, the building of a line of railroad, or creating a corporation for that pur-

pose, and providing a means for accomplishing the purpose; *Phillips et al. v. Town of Albany et al.*, **4-220**.

21. **TO BORROW MONEY.** The legislature of a state may, constitutionally, empower a corporation of its creation to borrow money by mortgaging its property and franchises, or by issuing preferred stock and pledging its revenues for the payment of dividends thereon, where such course is necessary to carry into effect the object for which the corporation was created. Even if the grant of power to make such pledge of the revenue was regarded as unconstitutional, after the payment of money on such pledge, chancery would scarcely refuse its aid in enforcing its collection by subjecting the property of the corporation to the payment of the loan; *City of Covington v. Covington & Cincinnati Bridge Co.*, **5-388**.

22. **TAXATION; FOREIGN CORPORATIONS.** The act of the legislature of Louisiana of 1855, imposing double the amount of license tax upon foreign insurance companies doing business in said state, as upon domestic companies, is not in conflict with the provision of the constitution requiring all taxes to be equal and uniform; *State of Louisiana v. Fosdick*, **1-581**.

23. —. The agent of an insurance company which is foreign to all the states of the Union, can not invoke the clause of the federal constitution securing to the citizens of each state the privileges and immunities of the citizens of the several states. *Id.*

24. **DISCRIMINATING AGAINST.** The law of the state of Kentucky discriminating between domestic and foreign insurance companies is constitutional; *Ins. Cos. v. Commonwealth*, **1-485**.

25. **TAXATION OF BANK SHARES.** The act of Kentucky taxing the shares in banks owned by individuals is valid under the constitution. State laws affecting banks are void under the federal constitution, only, when they interfere with the discharge of the duties of the bank to the federal government; *National Bank v. Commonwealth of Kentucky*, **3-12**.

26. **SPECIFIC TAXATION.** The provision, in the constitution of the state of Michigan, which requires that every law imposing a tax shall specify the object to which it shall be applied does not require that this shall be done, by the terms of the act, when such application is made by the constitution and can not be changed by legislative action; and, inasmuch as all specific taxes are appropriated by the constitution, a law imposing such a tax and omitting to provide for its application is not void; *Walcott v. People*, **3-456**.

27. —. The express power given, by the constitution, to continue specific taxes authorized by existing laws, and to impose specific taxes on corporations thereafter created, does not limit the right of specific taxation to such cases, but leaves the legislature at liberty to use it for such other purposes and branches of business as may be found to render it expedient. *Id.*

28. **EXEMPTION FROM TAXATION.** A constitution which forbids the exempting of property of a corporation from taxation impliedly forbids the renewal of an exemption which has expired or become merged; *Trask v. Maguire*, 5-42.

29. **REGULATION OF COMMERCE.** The power conferred on congress to "regulate commerce," does not exclude the commerce of corporations; *Paul v. Commonwealth of Virginia*, 1-19.

30. —; **INSURANCE.** The issuance of a policy of insurance is not a commercial transaction within the meaning of the constitution. *Id.*

31. —. The act of the general assembly of the state of Michigan requiring express companies to pay a specific tax of one per cent. of the gross amount of current business within the state, is not repugnant to that clause of the federal constitution which gives to congress the power to regulate commerce among the several states; *Walcott v. People*, 3-456.

32. **RAILROAD TARIFFS; STATUTE CONSTRUED.** The act of February 16, 1869, repealing section 6 of the act of February 6, 1854, amending the charter of the Covington and Lexington Railroad Company, and establishing a tariff of way freights on said road, is held to be unconstitutional; *Hamilton v. Kutte*, 1-549.

33. **RESERVED POWER.** The act of February 14, 1856, "reserving power to amend or repeal charters and other laws," is prospective, and does not apply to charters theretofore granted, unless the amendment is accepted by the stockholders. *Id.*

34. **CONSTITUTIONAL PROVISION CONSTRUED.** The provision, in the constitution of Illinois, of 1870, "the general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariff on the different roads in the state," etc., is a recognition of the palpable fact that there may be discriminations which are not unjust, and, by implication, it restrains the power of the legislature to a prohibition of those which are unjust; *Chic. & Alton R.R. Co. v. People*, ex rel. *Gustavus Koerner et al.*, com'rs, 5-196.

35. **AN UNCONSTITUTIONAL ACT.** An act, of 1871, of the state of Illinois, to prevent unjust discriminations and extortions in the rates to be charged by the different railroads for the transportation of freight, the court finds, forbids any discrimination whatever, under any circumstances, and whether just or unjust, in the charges for transporting the same class of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the companies, which they are not allowed to meet by evidence showing the reason or propriety of the discrimination and, upon this sort of ex parte trial, imposes, as a penalty for the offense, a forfeiture of the franchise, which would often be equiva-

lent to a fine of millions of dollars. Held, that such a proceeding, to be followed by such a penalty for the first offense, can not be sustained. *Id.*

36. **LIMITATION; CONCLUSIVE PRESUMPTIONS.** The legislature can not raise a conclusive presumption of guilt, from an act that may be innocent in itself, taking away the privilege of showing the actual innocence or propriety of the act and confiscating the property as a penalty for the supposed offense. *Id.*

37. **STATE CONTROL OF RATES.** The state has the right to prescribe the maximum rate of charges which a telephone company may demand for the use of its instruments; *Hockett v. State*, **10-349**.

38. —; **PATENTED ARTICLES.** The fact that such appliances are protected by letters patent of the United States, giving the owner an exclusive right to their use, does not preclude the state from regulating the right to use them within its borders. *Id.*

39. —. In legal contemplation all the instruments and appliances used by a telephone company, in its business, are devoted to public use, and property thus devoted becomes a legitimate subject of legislative regulation. This is not a taking of property for a public use within the meaning of the constitution. *Id.*

40. **LIABILITY OF DIRECTORS.** A statute which prescribes a penalty, a fine of not less than five nor more than fifteen dollars for each day, after a day fixed, during which there is a neglect, or refusal, of directors of a corporation, to make, verify and record a financial statement, is not a violation of a constitutional provision prohibiting the imposition of excessive fines; *State v. Cox et al.*, **9-277**.

41. **DUE PROCESS OF LAW.** An act which contemplates, and provides for, a full hearing, upon due notice to all persons interested, is not obnoxious to the constitution, as one which deprives stockholders of their property, liberties and franchises without due process of law; *Ward, rec'r, v. Farwell et al.*, **6-490**.

42. **REMOVAL OF CAUSES.** When the party makes an application for the removal of a cause, from state to federal jurisdiction in the manner required by the act of congress, it is error in the state court to proceed further in the matter, and every subsequent step is coram non judice; *Herryford v. Ætna Ins. Co.*, **3-511**.

43. —. The constitution of the United States secures to citizens of another state than that in which suit is brought, an absolute right to remove their causes into the federal court, upon compliance with the terms of the twelfth section of the judiciary act; *Ins. Co. v. Morse*, **5-61**.

44. —. The obstruction to this right imposed by a statute of a state which enacts, that "any fire insurance company, association or partnership, incorporated by or organized under the laws of any other state of the United States, desiring to transact any such business, as aforesaid, by any agent or agents, in this

state, shall first appoint an attorney in this state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal courts and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted," is repugnant to the constitution of the United States and the laws in pursuance thereof and is illegal and void. *Id.*

45. VOID AGREEMENT. An agreement of an insurance company, filed in pursuance of the act, derives no support from a statute thus unconstitutional, and is as void as it would be had no such statute been passed. *Id.*

46. LEGISLATIVE POWER; ARGUENDO. The English doctrine that the king can not force a new charter upon a corporation has no application in this country to the power of the legislature over municipal corporations. The powers of a municipal corporation may, without its consent, be qualified, abridged or abolished; *City of Clinton v. Cedar Rapids & Missouri River R.R. Co.*, 2-253.

47. PROHIBITIONS; DEBT. Constitutional prohibitions against the contracting of a debt by the state to aid in any work of internal improvement, and the subscription for stock by a county in any incorporate company, until the same be paid for at the time of such subscription, does not include cities within its scope; *Thompson v. City of Peru*, 2-213.

48. DESTRUCTION OF BUILDINGS. The destruction of buildings to prevent the spread of a conflagration is not a taking of private property for public use, in the sense of a constitutional provision requiring compensation for property when so taken; *M'Donald v. City of Red Wing*, 2-549.

49. ELECTION OF OFFICERS. As to offices in existence when the constitution of New York of 1846 was adopted the legislature has no power to vest the appointment of the incumbents in the governor and senate. It belongs exclusively to the local power to fill such offices, either by appointment or as the legislature may direct; *Metropolitan Board of Health v. Heister*, 2-634.

50. NEW DISTRICTS. The legislature has power, under the constitution, to create new civil divisions of the state, embracing more than one county, for purposes of temporary or permanent civil government, without impairing the county organization; and officers of such newly created districts may be legally appointed by the governor and the senate. *Id.*

51. NUISANCE; PUBLIC HEALTH; TRIAL BY JURY. An act conferring upon a board of health commissioners power to prohibit the driving of cattle through certain streets at certain hours, or the maintenance of slaughter houses within certain territory in a city, is not in violation of the constitutional provisions providing that "trial by jury in all cases in which it has heretofore been used shall remain inviolable forever." And that "no person shall

be deprived of life, liberty or property, without due process of law." *Id.*

52. ABATEMENT OF NUISANCES. The provision, in the constitution of Massachusetts, authorizing the legislature to make "all manner of wholesome and reasonable laws so as the same be not repugnant or contrary to this constitution," confers power upon the legislature to provide for the taking, by a city, of the fee-simple title to real estate when it is necessary to change the character of the land to remove a nuisance dangerous to the public health; *Dingley v. City of Boston*, 2-503.

53. EXERCISE OF LEGISLATIVE AND JUDICIAL FUNCTIONS. The designation of the property which may be taken for such purpose is an exercise of legislative power; the ascertainment of its value is properly referred to the judiciary. *Id.*

54. ROADS AND HIGHWAYS; TITLE OF ACT. An act "for opening and regulating roads and highways," may embrace, within that title, provision for the construction and maintenance of bridges; *Fletcher v. Oliver, sheriff*, 2-47.

55. REVENUE LAW. An act providing for raising moneys, by taxation, for the opening and regulation of roads and highways, including bridges, is not a revenue act within the meaning of the constitutional requirement that all revenue bills shall originate in the house of representatives. *Id.*

56. FEE FOR LICENSE NOT A TAX. A license for the sale of intoxicating liquors within the limits of a municipal corporation is not a tax within the meaning of the constitutional provision requiring uniformity in the assessment and collection of taxes; *East St. Louis v. Wehring*, 2-148.

57. —. License taxes may be made to conform to the advantages and disadvantages of localities for business; but it should not discriminate between persons having equal facilities for profit. *Id.*

58. LICENSE. The legislature of Kentucky has the constitutional power to authorize towns to refuse or grant licenses for the sale, by retail, of intoxicating drinks, and to fix a tax therefor; *Mason v. Trustees of Lancaster*, 2-351.

59. THE IMPOSITION OF TAXES. The authorities of a town may be authorized by law to levy taxes as fees for licenses, for municipal purposes. *Id.*

60. ASSESSMENTS: UNIFORMITY. The constitution of the state of Indiana provides that "the general assembly shall prescribe by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall seem a just valuation for taxation of all property, both real and personal." Held, that a rate of assessment which is uniform and equal throughout the district in which it is imposed, is consistent with the constitutional provision; *Palmer v. Stumph*, 2-216.

61. LOCAL AND SPECIAL ACTS. A law which is general in its

provisions and open to all the citizens of the state who may desire to avail themselves of its benefits, is not a local or special law within the meaning of the provision of the constitution prohibiting local or special legislation. *Id.*

62. BOUNTY TAX. The legislature of Illinois has power to authorize taxation by a municipal corporation for the purpose of refunding money raised to pay bounties to volunteers, and which was raised on the faith that the money so advanced would be refunded; *Johnson et al. v. Campbell et al.*, 2-211.

63. CURATIVE LEGISLATION. The legislature of Minnesota has power, under the constitution of that state, to validate the illegal issuance of bonds by a municipal corporation in payment of bounties to persons enlisting in the military service of the United States; *Comer, treas., v. Folsom*, 2-555; *Kunkle v. Town of Franklin*, 2-561.

64. EFFECT OF. When bonds are issued by a municipal corporation, under a statute upon the subject, ratification by a curative act passed by the legislature, is, in all respects, equivalent to an original authority, and cures all defects of power, if such existed, and all irregularities in the execution; *City of Beloit v. Morgan*, 2-11.

65. COMMISSIONERS OF TAXES. The office of commissioner of taxes in the city of New York comprises the official functions and duties of offices existing at the date of the adoption of the constitution of 1846; and the act of the general assembly vesting the power in the governor to fill such office by appointment, by and with the consent of the senate, is unconstitutional; *People v. Raymond*, 2-619.

66. COUNTY SCRIP; FORFEITURE OF. A statute of the state of Arkansas authorized the county court of any county to make an order fixing a time within which outstanding county scrip shall be presented for redemption, cancellation, re-issue or classification, and provided for giving notice thereof to the holders of such scrip. It further provided that all persons holding any of such county scrip, who should neglect or refuse to present the same, as required by such order at the county court, after the notice aforesaid, shall be forever debarred from deriving any benefit from these claims. It was held, that this act is valid as to all scrip executed by the county after its passage; *City of Beloit v. Morgan*, 2-11.

67. AMENDMENT OF CHARTER; LOCAL TAXATION. A railroad company was organized and a portion of the grading on its line done by exhausting all its capital. The legislature amended the charter, authorizing a subscription of \$300,000, additional stock, by the citizens within a defined boundary in one section of the county through which the road runs. It directed the county judge to subscribe the amount, and that it be collected by a tax on the tax payers within the prescribed boundary, to be levied as

other taxes are levied. Held, (1) that the act was not invalid as an infringement upon the rights of the original stockholders; (2) that it was not invalid because it provided for the levy of taxes on a portion of the county only; County Judge of Shelby County v. Shelby R.R. Co., 2-363.

68. CONSTITUTION OF KENTUCKY CONSTRUED; OFFICERS OF MUNICIPAL CORPORATIONS. The constitution of Kentucky provides that the "officers of towns and cities shall be elected for such terms, and in such manner, and with such qualifications as may be prescribed by law," and that "all district, county or town officers" shall reside "within their respective districts." The legislature, by the act of February 24, 1868, provided for the organization of a "police force for the city of Louisville and county of Jefferson," consisting of a board of police commissioners and policemen divided into two classes: one for the city and county, elected and appointed by the board and compensated by the city; the other for the county, outside the city, appointed by the board with a limitation as to number fixed by the county court, and compensated by the county. Held, valid under the constitution; Police Commissioners v. City of Louisville, 2-331.

69. ELECTION. The term "election," in the sense in which it is used in the constitution, means a selection by the popular voice of a district, county, town or city, or by some organized body, in contra-distinction to an appointment by some single person or officer. *Id.*

70. —. The constitutional provisions above mentioned have application only to those who are strictly city officers. *Id.*

71. SALARY. The source of an officer's salary does not indicate his character. *Id.*

72. STATUTE OF MASSACHUSETTS. It was enacted by the statute, under consideration, that the turnpike way, bridges, draws and piers belonging to the turnpike and bridge corporation named, and lying in three cities and two towns named, should be laid out and become a public highway upon the acceptance of the award of commissioners to be appointed by the supreme judicial court or any justice thereof and judgment thereon; that upon its becoming a highway, so much of it, excluding the abutments, bridges, draws and piers, as lies in reach of said cities and towns, should be maintained by them respectively; that they should collect from a railroad company, named, such proportion of the expense of maintaining the turnpike and way as should be due from the company under the provisions of the act; that if, in the opinion of the commissioners, any city or town should have an undue burden cast upon it in maintaining its proportion of the turnpike passing through it, they should determine and decree what sum in gross should be paid to such city or town, and by what cities and towns in two counties named, or whether either of said counties should contribute to said sum, and in what proportions,

as a final adjustment of expense and benefit. It was held, that the act was not unconstitutional, either in the fact that it required a county benefited, or towns and cities within it, to contribute toward maintaining parts of a highway in other counties; or as imposing on the judiciary the exercise of legislative or executive power, or assuming to the legislative the exercise of judicial power; *Salem Turnpike & Chelsea Bridge Corp. v. County of Essex et al.*, 2-498.

See, also, SPECIFIC TITLES.

CONTRACT.

1. CHARTER NOT PART OF. In the absence of express stipulation, the charter of a corporation is not to be taken as part of a contract made by the corporation; *Merrill v. Beaver*, 6-549.

2. MANNER OF MAKING. Unless restrained, by legislative enactment, to a specific mode of contracting, the contracts a corporation has capacity to make may be made in that manner, or form, in which a similar contract by an individual could be made; *Trustees of University v. Moody*, 6-166.

3. —. In the United States the execution of a contract is valid if it be shown there was authority in the agent to contract; *Crowley v. Genesee Mining Co.*, 6-260.

4. CONSIDERATION. A railroad corporation having issued first mortgage bonds, the proceeds of which were inadequate to complete its road, an association was formed which contracted to furnish money sufficient to insure its completion and for the payment of interest upon its mortgage bonds then about to fall due, and also to purchase and hold the company harmless from a matured lien on the road, then held by the state, for about \$7,000,000. The cash outlay to be made under the contract amounted to about \$2,000,000 and the associated parties, in acquiring the state lien, were required to enter into bond with the state, in the penal sum of \$500,000, for the completion of the road within a time specified. In return for these payments, liabilities and assumptions, the company, which was financially powerless, issued to the association \$4,000,000 of second mortgage bonds and \$5,000,000 of stock. These bonds and stock were issued upon sufficient consideration; *Kitchen et al. v. St. Louis, Kansas City & Northern Ry. Co.*, 8-199.

5. WHEN BINDING. A corporation can only be bound by corporate acts; *Finley Shoe & Leather Co. v. Kurtz*, 6-593.

6. INDIVIDUAL ACTION. An undertaking by all the stockholders, acting as individuals, severally, in behalf of a corporation will not bind it. Where joint action is required, by law, individual action is of no avail. *Id.*

7. WHEN CORPORATE ACT. In respect of the particular note in suit, it was considered as apparent on the face of it that it was executed by the signers in their capacity as officers of the corpora-

tion — their official character or designation of office and the corporate seal being attached — and no extrinsic facts were necessary to be shown ; *Scanlan v. Keith*, 9-143.

8. **USE OF WORD "WE."** Nor need any importance be attached to the use of the words "we promise to pay," in the body of the note. The word "we" may not improperly be used to denote a corporation aggregate, such as this is, and in the connection in which it is used, in this note, it may more appropriately be regarded as referring to the corporation than the persons, as individuals, who signed the instrument. *Id*

9. **AUTHORITY TO CONTRACT; HOW CONFERRED.** Authority to contract, in the name and in behalf of a corporation, at a regular meeting of the directors, or by their separate assent, or by any other mode in which the company is accustomed to do such acts is binding ; *Crowley v. Genesee Mining Co.*, 6-260.

10. **BY RESOLUTION, ETC.** The resolutions, declarations, or admissions of the managing board are full evidence of an indebtedness, and in no more appropriate mode could it be recognized and its amount and time of payment expressed ; *Trustees of University v. Moody*, 6-166.

11. **AUTHORITY INFERRED.** The authority of an agent to make a contract of employment may be inferred from the admitted relations of the agent to the company, actually within the scope of his authority, or from its usual course of business ; and, proof that the agent is president, superintendent and general managing agent of the company, is sufficient evidence of his authority to act in the premises ; *Crowley v. Genesee Mining Co.*, 6-260.

12. **IMPLIED.** A corporation may be bound by an implied contract, in the same manner as an individual ; *Pew v. First Nat. Bk. of Gloucester*, 7-539.

13. —. At common law a corporation could not manifest its intention by any personal act or oral discourse ; and spake and acted only by its common seal. This rule has been relaxed, and corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts, to be deduced, by inference, from corporate acts, without either a vote or deed or any writing. The doctrine of implied municipal liability applies to all cases where money, or other property, of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the corporation receives money, or other property, which does not belong to it, it is its duty to restore it to its true owner, or, if used by it, to render an equivalent to the true owner. From the like general obligation, the law, which always intends justice, implies a promise ; *Methodist Episcopal Church, South, v. Mayor and aldermen of Vicksburg*, 8-20.

14. —. When it is sought to render a corporation liable for the

acts of servants, or agents, a cardinal inquiry is, whether they are the servants, or agents, of the corporation. If the corporation appoints, or elects, them and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their duties; and if those duties relate to the exercise of corporate powers and are for the peculiar benefit of the corporation, in its local or special interest, they may be justly regarded as its agents or servants and the maxim of respondeat superior applies. *Id.*

15. **PRIOR TO ORGANIZATION.** An agreement among the owners of a mine, who expect to organize a corporation, but have not done so, that one is entitled to a given number of shares of the stock of the company is no contract of the corporation; *Morrison v. Gold Mountain Gold Mining Co.*, 6-240.

16. **ADOPTION OF CONTRACT MADE PRIOR TO ORGANIZATION.** The law of a state (*Michigan*) provided for the filing of the articles of association of a proposed corporation, with the secretary of state and with the county clerk etc., before the corporation should commence business. If before such filing, individuals, who become members thereof, having authority, shall enter into a contract for machinery, necessary to enable it to carry on its proposed business, and their contract shall be subsequently recognized and ratified by the corporation, when formed, the corporation is liable; *Whitney v. Wyman*, 6-77.

17. **ASCERTAINMENT OF PARTIES.** When the question arises, whether a contract executed by a corporate officer is that of the company or of the officer, the court will look to the conclusion of the instrument as well as the commencement, for the description of the parties bound by the deed; *Northwestern Distilling Co. v. Brandt*, 5-249.

18. **EXTRINSIC EVIDENCE, AS TO WHO BOUND BY.** A party will not be permitted to show, by oral testimony, that his written agreement, understandingly entered into, was not, in fact, to be binding on him. So it has been held, where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties that it was to be the note of the church corporation, and not that of the trustees executing it; the principle being that such instruments will be construed as the parties made them, without the aid of extrinsic evidence; *Scanlan v. Keith*, 9-143.

19. —. There is another principle, however,—that where a person signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appears, or is made to appear, it is the obligation of the company, and if the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts—

collateral though they may sometimes be — may be shown by extrinsic evidence, in order that it may appear whose obligation it is. *Id.*

20. **EXTRINSIC EVIDENCE, AS TO WHO BOUND BY.** Assumpsit was brought upon a promissory note, against A. B., who, it was alleged, made the note jointly with C. D. The note sued upon was as follows: "Ninety days after date we promise to pay to the order of" E. F., a certain sum of money, at a specified place, and was signed underneath, at the right hand, A. B., "Pres't Chicago Ready Roofing Company," and at the left hand, at the usual place for the signature of an attesting witness, it was signed C. D., "Sec'y," with the seal of the "Chicago Ready Roofing Company" attached. The defense was that the note was the obligation of the "Chicago Ready Roofing Company," claimed to be a corporation, and not the individual obligation of the officers who executed the same. It was held to be competent for the defendant to prove that the "Chicago Ready Roofing Company" was a corporation existing under the laws of the state, and the character of the business carried on by it and other extrinsic facts and circumstances attending the transaction, as tending to show whether the note was that of the corporation, or of the persons whose names were signed to it. *Id.*

21. —; **SUFFICIENCY OF PROOF.** Upon the question as to the proof required in such case to establish the existence of the corporation, its legality not being in issue, it would seem, for the purposes of the defence interposed, it was sufficient to show it was a de facto corporation, actually engaged in the business for the carrying on of which it purported to have been organized, and this was sufficiently proven by the fact that the plaintiff had transacted business with it as a corporation, and in that way recognized its existence. *Id.*

22. —. Taking all the facts appearing — the existence of the corporation; its engaging in the business for which it purported to have been organized; the dealings of the plaintiff with it as a corporation; the fact the note was for a balance due from the corporation for materials sold to it by the plaintiff; that the signers were the president and secretary of the company, and known to the plaintiff to be such; taking a note executed by the officers of the company, with its corporate seal attached, and, finally, suing upon the note as the obligation of the corporation, and recovering judgment thereon — they abundantly show the real character of the instrument as that of the corporation, and not of the individuals who signed it. *Id.*

23. **LOCATION OF A RAILROAD; INVALID.** A contract was made between the president of a railroad corporation, one of its directors, and its construction agent, of the one part, and two land owners, of the other part, by which the latter were to sell to the first mentioned parties an undivided one-half of 160 acres of land upon

these terms: No money was to be paid by the purchasers, but the land was to be laid out into town lots and sold. The first proceeds of the sale, to the amount of \$4,800, were to be retained by the parties of the first part, as owners, and, when this sum was realized, they were to convey an undivided half of the residue. The consideration for the agreement was, that the parties of the first part should "aid, assist and contribute to the building up of a town on said land." The land was situated upon one railroad, and where another road, then in process of construction, might, or was expected to, cross it. A town was built partly on this tract of land, and a bill was filed for an account of sales and conveyance of a half interest in the unsold lots. The court held the contract to be a bribe on the part of the land owners, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. This, in any point of view, was in violation of the duty of the officials and agents of the corporation, both to stockholders and the public, against public policy and a contract not to be enforced in equity. A cross bill having been filed to cancel the contract as a cloud upon title, it was held, that as the land owners had entered into a contract, the effect or tendency of which was to induce complainants to commit a breach of duty, they were entitled to no affirmative relief; *Bestor et al. v. Wathen et al.*, 4-351.

24. WHICH OF TWO MUST SUFFER LOSS. If the owner of property or chose in action voluntarily clothes another with the indicia of ownership, by which the latter is enabled to sell or pledge the same, for his own benefit, to an innocent party for value, the former can have no relief against such act to the prejudice of the pledgee or vendee. Where one of two or more persons must suffer loss, it must fall upon him whose conduct made it possible for loss to occur; *Otis, adm'r, v. Gardner et al.*, 9-199.

25. CONSTRUED; RECOVERY. A railroad contractor agreed with the company to construct and equip its entire road for \$1,600,000, of which \$250,000 was to be paid in cash and cash assets, and the balance in the bonds and stock of the company, the price named being more than twice the cash value of the work. The contract provided that payments should be made on monthly estimates, and in such of the said descriptions of payment as the contractor deemed would best subserve his purpose in doing the work; but the contract fixed no time for the completion of the work. It also provided that both the parties should aid in converting said assets, bonds and stock into means for carrying on the work, and that the contractor need not carry it on faster than such means would serve. The contractor performed work under the contract to the nominal amount of \$117,000, which at his request was mostly paid him in the cash assets and, then, the charter of the company having expired by its own limitation, the work was suspended by mutual consent, and the road abandoned, its bonds

and stock thus becoming worthless; held, that the contractor is bound to account to the company for all actual profits realized from the work; *Four Mile Valley R.R. Co. v. Bailey et al.*, **3-659**.

26. **ON CONDITION.** A promise by a corporation to pay money when it "should succeed in sinking a shaft on its leased lands, and developing a paying vein of coal," the contract being silent as to when the shaft should be sunk, further than the company should "use all reasonable efforts to sell stock to raise sufficient money to dig a shaft," does not bind the company to sink a shaft regardless of the means at command, nor is it bound to sell its stock at less than par for that purpose; *Oliphant v. Woodburn Coal Co.*, **10-374**.

27. **RELEASE OF DEBT ON CONDITION.** There was testimony that the pastor offered to forgive the society a portion of the debt, if they would pay \$50 to a person named; but there was no evidence that they had paid the \$50, or ever acted upon the proposition; held, there was evidence sufficient to sustain a finding for the whole amount; *McCrory v. McFarland*, **10-310**.

28. **PRESUMPTION AS TO.** Corporations are presumed, in dealing with each other, to contract within the powers and limitations of their charter. Where general words are used, in a contract between such companies, which words admit of a double construction, those words must be construed consistently with the scope and power of the charter; *Morris & Essex R.R. Co. v. Sussex R.R. Co.*, **3-579**.

29. **TRAFFIC CONTRACTS.** The right of railroad corporations to divide through fares and freight on authorized lines, or to offer inducements, by a reduction in rates, to secure freight and travel over such lines, are contracts concerning their own authorized business and not objectionable; if not made illegally, without consideration or against conscience. *Id.*

30. **BONDS.** The bonds of a town issued in payment of bounties to persons who enlisted in the military service of the United States are not invalidated by the fact that the enlistments were placed to the credit of a district which embraced another town; *Comer, treasurer, v. Folsom*, **2-555**.

31. **ASSETS; RIGHTS OF CREDITORS.** When the property and franchises of an insolvent corporation are sold for a certain consideration, and the mortgage bondholders, who had a lien upon the property sold, entered into an arrangement with stockholders and the corporation, pursuant to which such sale was made, wherein it was agreed that eighty-four per cent. of the proceeds should be paid to the bondholders entering into the arrangement, in full satisfaction of their bonds, and the remainder be distributed to the stockholders, it was held, that the portion set apart for the stockholders was a fund belonging to the corporation discharged of the lien of the mortgage, and subject, as other assets, to the

payment of the debts of the corporation; Chic., R. I. & Pac. R.R. Co. *v.* Howard et al., 1-1.

32. **CONTRACT BY BOND AND STOCK HOLDERS.** A contract, for the sale of the property and franchises of a corporation, by a meeting of a majority of the bond and stockholders, acting without authority, to make a contract binding upon the corporation, is valid when carried into effect with the consent or subsequent ratification of all the parties interested in the subject matter of the sale. *Id.*

33. **NEGOTIABILITY.** A certificate executed by a trustee, showing that he has received a number, named, of certificates of stock in a corporation, and that the bearer of the certificate is entitled to a certain number of dollars in bonds, to be issued by a new corporation, is not a negotiable instrument in such sense that the holder is protected against equities which could be asserted against the original holder. *Id.*

34. **MODIFICATION OF CONTRACT.** The common council of a city has power, without a petition of property owners, to modify, with the consent of the contractor, a contract for the improvement of a street, which it had power to make without such petition, such modification being made in good faith; Hallencamp *v.* City of Lafayette, 2-225.

35. **RATIFICATION OF ILLEGAL CONTRACTS.** Where an order, drawn by one board of directors of a school district, was void in its inception, no act of a succeeding board can render it valid; Glidden *v.* Hopkins, 2-172.

36. **PUBLIC AGENTS.** A contract made by a public agent, within the general scope of his powers, does not bind his principal in the absence of specific authority; Parcel *v.* Barnes & Bro., 2-39.

37. —. A city can not ratify the unauthorized act of its agent, in so far as the same affects the rights of third persons; Meuser *v.* Risdon et al., 2-101.

38. **RATIFICATION OF UNAUTHORIZED CONTRACT.** The fact that maps and apparatus were distributed among the several sub-districts, and were thenceforward used in the schools thereof, with the knowledge of the directors and electors, and the further fact that no steps were taken at the regular district meetings, held thereafter, to repudiate the contract, and return the property, did not amount to a ratification. Nothing less than the action of the electors in their corporate capacity would amount to a ratification; Taylor *v.* Dist. T., 2-300.

39. **WITH DIRECTORS — RATIFICATION.** As a general rule a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation; such contract does not necessarily require any independent and substantive act of ratification, but it may become established a valid contract by acquiescence. The right to avoid it may be waived; Kelley *v.* Newburyport, etc., Horse Ry. Co., 10-600.

40. **LACHES OF STOCKHOLDERS.** The existence of a contract and the issue of mortgage bonds under it, being reported to a meeting of the stockholders in due time and no objection being made thereto and, no offer of aid being tendered, the embarrassed corporation executing the contract, but the parties to the contract being allowed to proceed and expend their money in aid of the corporation, in good faith, it is too late, after the lapse of five years, for stockholders to impeach the transaction; *Kitchen et al. v. St. Louis, Kansas City & Northern Ry. Co.*, 8-199.

41. **REPUDIATION.** It is competent for a corporation, when sued upon a promise to pay, executed by an agent in its name, to show, as matter of defense, that immediately on its existence becoming known, or that power to execute negotiable paper had been exercised by its agent, its validity was formally and at once repudiated; *N. Y. Iron Mine v. First Nat. Bk. of Negaunee*, 6-612.

42. **VOIDABLE ONLY.** A savings bank was prohibited from loaning money on notes, bills of exchange, drafts, or any personal security. A loan was made to a firm on security of stock, and it was claimed in an action by an agent, employed to make sale of the stock, by reason of a subsequent sale of the same stock without notice to him of revocation of his authority, that the loan on security of the stock was in violation of the charter, wherefore the employment of plaintiff to sell the same was void. The court held the defense untenable; at most the pledge was voidable, not void, and plaintiff, in accepting the employment to sell, was not bound to inquire as to his employer's title; *Sistare v. Best, rec'r*, 9-626.

43. **IMPOSSIBLE.** A private corporation can not, by entering into a peculiar form of contract, avoid an action at law for the breach of such contract. Nor can it by its contract confer upon an appellate court original jurisdiction for the collection of money demands; nor will its insolvency or the fact that it can not meet a demand until the necessary funds are raised by assessment, or otherwise, confer such jurisdiction; *Burland v. North-western Mut. Ben. Assoc.*, 7-592.

44. **ULTRA VIRES.** A contract to purchase for sale to another a quantity of excelsior, by a corporation organized for the manufacture and sale of carriages, is ultra vires and void; *Day v. Spiral Spring Co.*, 10-647.

45. —; **REPUDIATION.** Being void, such contract is open to repudiation by either party. *Id.*

46. —. Plaintiff contracted to manufacture for defendant corporation a certain quantity of excelsior which defendant had contracted to sell to other parties, and having delivered a portion under the contract, refused to go on with the contract, and brought suit for the value of what had been delivered. Held, plaintiff was entitled to recover for as much as had been delivered and not paid for. Held, further, that plaintiff was not estopped

to allege the illegality of the contract as *ultra vires*. Held, further, that defendant could not recoup against plaintiff's claim, damages for a failure to go on with the contract, because to allow recoupment would be indirectly to enforce the contract. *Id.*

47. **IN VIOLATION OF STATUTE.** A contract made by a corporation, which is expressly prohibited from making such a contract, is void so far that the corporation can not maintain an action thereupon. This is so even though the statute does not, in terms, declare that such a contract shall be void, but merely prescribes a penalty for making it. When the legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one means of its prevention, that the courts should hold it void. That the legislature imposed a penalty, for the violation of the provisions of the law, does not, in the remotest degree, legalize or give validity to the contract. It but shows that the general assembly intended to adopt such measures as should compel obedience to the law; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 3-263.

48. **PROHIBITED BY LAW.** A contract to do a thing prohibited by statute is not, necessarily, void if the statute visit the unlawful act with a penalty. If the thing be *malum in se*, the contract can not be enforced, but as to things not immoral or against public policy it may be sufficient to enforce the statutory penalty only. If it was not the intention of the law maker to make the contract void, it will be enforced, and for the violation of law the penalty may be applied; *Union Gold Mining Co. v. Rocky Mountain National Bank*, 4-298.

49. **CONFLICT OF LAW.** Where there is a conflict of applicatory laws, the parties are presumed to have made their agreement with reference to that statute which is most favorable to its validity and performance; *Talbot v. Merchants Despatch Transp. Co.*, 5-372.

50. **IN EXCESS OF CORPORATE POWERS.** Although a corporation can make only such contracts as its charter authorizes, it may be held liable for acts and contracts not permitted by such charter. The general rule is, that if a corporation, in the exercise of a franchise not granted to it by the legislature, makes a contract or performs an act, the want of authority may be pleaded and the courts will not interfere to grant redress between two parties engaged in an illegal enterprise. If the contract be within the scope of the franchise and merely fails to conform to the regulations prescribed by the charter for the guidance of the corporate officers and the protection of the rights of the members as to each other, the corporation may be held liable, under the general rules of law as to agents, estoppel, waiver, etc.; *City Fire Ins. Co. of Hartford v. Carrugi*, 4-333.

51. **IN EXCESS OF AGENT'S AUTHORITY.** Where the officers or agents of a corporation have exceeded, not the powers of the cor-

poration, but their own power as agents, the corporation stands like other principals employing agents. If it, knowingly, receives the fruits of the excessive exercise of authority by its agent, it is held to have ratified the act; *Wood Hydraulic Hose Mining Co. v. King*, 4-344.

52. WITH AGENTS OF TOWNS. A town meeting directed its selectmen to contract for the building of a sewer of certain dimensions, "the proposals to be advertised and the contract given to the lowest bidder." They advertised for proposals to build a sewer, according to specifications which presented dimensions, and reserved to the selectmen "the right to reject all bids, if none are satisfactory." The party making the lowest bid was notified that none of the bids made would be accepted. The matter was referred to another town meeting, which referred the whole matter to the selectmen, with instructions to "build the sewer at the earliest possible moment." Held, (1) that the bidder had no right of action against the town, on the contract; (2) that he had no right of action against the town for time and money spent in making estimates for it; (3) that his rights were not affected by the action of the last mentioned town meeting; *Palmer v. Inhabitants of Haverhill*, 2-450.

53. BY SCHOOL DIRECTORS. The board of directors of a school district township in Iowa have no power to make contracts for maps, charts and other school apparatus, without being first authorized thereto by a vote of the electors; *Taylor v. District Township of Otter Creek*, 2-309.

54. The board of directors of a district township have no power, unless authorized by a vote of the electors, to bind the district by the purchase of maps, charts and other school apparatus; *Taylor v. District Township of Wayne*, 2-300.

55. THE POOR; MEDICAL SERVICES. Section 4 of the pauper act of the state of Illinois, imposes upon counties a liability to pay a reasonable compensation to persons who have been legally employed, and who do render medical aid, to persons falling sick within the county and having no money or property with which to pay for such services; *Board of Supervisors of La Salle County v. Reynolds*, 2-202.

56. —; EXTENT OF LIABILITY. In such cases the obligation of the county is to allow a reasonable compensation, and the decision of the board of supervisors, as to what is a proper allowance, is not conclusive. If a proper amount is not allowed an action may be maintained therefor. *Id.*

57. —; POOR HOUSE. Such persons are not paupers within the meaning of the statute, and the fact that a poor house has been provided by the county for the reception of paupers does not affect the liability of the county for medical attendance furnished them. *Id.*

58. ASSESSMENTS. When a corporation made a contract with

a party to perform certain work upon its streets, wherein it was expressly stipulated, on the part of the contractor, that he would look for payment only from the proceeds of certain special assessments already levied, and from the proceeds of any special assessments which might thereafter be levied, he agreeing to make no claim against the corporation, except as upon the collection of such assessments; it was held, in a proceeding by mandamus, to compel payment, that such contractor must abide by his agreement to look for payment only to the proceeds of special assessments made or to be made, it appearing that the corporation was, in good faith, and with reasonable diligence, proceeding to make collections by means of such assessments; *City of Chicago v. People, ex rel.*, 2-192.

59. **EMPLOYMENT OF ATTORNEY.** It is competent for the city of New Orleans to employ an attorney to enforce the payment of claims due to the city, when such duty is not imposed upon any city officer; and when such a contract has been entered into, on the part of the corporate authorities, by the passage of an ordinance, it can not be rescinded by a repeal of the ordinance; *State of Louisiana, ex rel., v. Heath, mayor*, 2-372.

60. **EXCLUSIVE PRIVILEGES.** A municipal corporation entered into a contract with a gas company, conferring upon it the exclusive privilege, for a term of years and until notified to the contrary, of lighting the city with public lamps, the number to be agreed upon; the right to lay down and extend its pipes and other apparatus through all the streets, alleys, lanes and squares of the city and declaring that still "further to encourage the company, it would take fifty lamps to begin with, to be extended hereafter as the public wants and increase of the city might demand, and such as might be agreed upon by the company and the city corporation." The gas company in consideration of these grants, concessions and privileges, bound itself to furnish to the city gas at half the price charged to private consumers. It was held, that the contract did not give to the gas company a right which would be impaired by a subscription on the part of the city to the stock of a new gas company, whose object was the introduction of gas into the same city; *City of Memphis v. Dean*, 3-1.

See **AGENCY**; **ESTOPPEL**; **POWERS**; **PROMISSORY NOTES**; **ULTRA VIRES AND CORPORATIONS** by their class.

CONTRIBUTION.

1. **AMONG STOCKHOLDERS.** A statute provided that all stockholders of a corporation should be severally and individually liable to the creditors of their corporations, to an amount equal to any unpaid subscription to stock held by them respectively. If any one stockholder be required, under such statute, to pay a debt due by the corporation, he is entitled to contribution from all other

stockholders whose subscriptions are unpaid; *Weber v. Finley*, for the use, 7-385.

2. AMONG STOCKHOLDERS. In such case if a stockholder shall not have paid up his subscription, but shall claim to be a creditor of the corporation, his unpaid stock is liable for the debt and he can not recover from any other stockholder, to the full extent of his claim. *Id.*

3. —. Where the stockholders are individually liable for its debts and a bill is filed by one creditor, for the use of all creditors, against one stockholder, the court should ascertain the whole amount of the indebtedness of the company and render a decree for the payment of all of it. It may be, then, collected from the solvent stockholders or stockholder. In settling the equities between stockholders, however, each should be made to contribute his proportion rated by the amount of his stock. If complainant be himself a stockholder, he should be made to contribute his share of his own debt and to all other debts which may be established; *Perkins v. Sanders et al.*, 8-53.

4. —. When a joint action may be or is instituted against stockholders of an insolvent corporation, to recover of them the sums, by them, due on subscriptions to stock, it is not error to award a judgment for the entire sum of the debt against all, to be discharged on the payment of specified sums apportioned among the stockholders, as they are bound to pay under the statute; *Overmeyer v. Cannon*, 9-241.

5. CONTRACT OF STOCKHOLDERS. Plaintiffs and other holders of stock of an insolvent corporation, supposing themselves to be personally liable for the payment of the corporate indebtedness, agreed among themselves and with defendants in action, who were stockholders of the same company, that defendants, for the benefit of all parties to the agreement, should negotiate for and effect the purchase of the corporate debts, paying therefor less than their nominal amounts, and, thereafter, collect them of the corporation and receive from the corporate funds a sum, more than sufficient to pay all their disbursements and expenses. In such a case defendants can not recover of plaintiffs a sum in excess of the cost of obtaining a discharge of plaintiffs' personal liability. In equity, all the cost having been paid by the money of the corporation, by the defendants, they have no valid claim, as against plaintiffs, for indemnity or contribution; *Sinclair et al. v. Redington et al.*, 8-387.

6. SUBROGATION. A holder of stock in a corporation who pays the amount of his individual liability to a firm of which he is a partner, for a debt due such firm from the corporation, thereby acquires an equitable right against his co-stockholders, recognizable and enforceable, only, in equity; *Buchanan v. Meisser*, 9-209.

CONVERSION OF STOCK.

1. **WRONGFUL SALE BY PLEDGEE.** The pledgee of stock, who holds such stock for the payment of money borrowed, holds the same subject to the pledgor's legal right to demand and receive the evidence of ownership on payment of the debt. Pledgee has no right to sell such shares without first demanding payment of the debt due from pledgor, or giving him notice of an intention to sell. Neither may he sell such stock, at private sale, for less than its current value. If he acts otherwise he becomes liable to pledgor for the difference between the amount of the debt secured and the amount of the stock; *Nabring v. Bk. of Mobile*, 6-124.

2. —. If a corporation, without authority, shall dispose of the shares of a stockholder, the latter may recover the value of the stock at the time of such sale; or, in some cases, the money received by reason of the sale; *Marseilles L. & W. P. Co. v. Aldrich*, 6-406.

3. **WHAT IS NOT A CONVERSION.** It is not a conversion of stock by the corporation, where its president draws an order on himself, as president, to transfer, to a person named, a certain number of the shares of the company which he (as president) and the secretary of the corporation refuse to deliver; *Morrison v. Gold Mount. G. M'g Co.*, 6-240.

4. **TROVER, AS A REMEDY.** Action of trover will lie for the wrongful conversion of shares of stock in an incorporated company; *Nabring v. Bk. of Mobile*, 6-124.

5. —; **WHEN NOT LIE.** One who has not the legal right to stock of a corporation can not sustain an action against the corporation for converting it; *Morrison v. Gold Mount. G. M'g Co.*, 6-240.

6. —. Where the legal title of shares of stock has been placed by pledgor, in pledgee, the supreme court of Alabama is inclined to agree that trover will not lie. In such case, however, the form of action must be objected to in the trial court; for there, the plaintiff might amend, by adding a count in case, for the same cause of action, and recover on case made; *Nabring v. Bk. of Mobile*, 6-124.

7. —. In action of trover, for the wrongful conversion of shares of stock, which have been pledged (as security for the payment of money borrowed), pledgee may recoup the debt due to him from defendant. *Id.*

CORPORATE ACTS.

1. **WHAT CONSTITUTE.** Before any act can be accepted and treated as the exercise of a corporate franchise or privilege, it must be made to appear that it is some thing which distinctly pertains to corporate powers. Such acts as would justify an interference on the part of the state to test corporate rights; *Kirkpatrick v. U. P. Church, Keota*, 10-379.

2. **WHAT CONSTITUTE.** Acts which may as properly belong to a partnership or unincorporated association, will not be so regarded. *Id.*

3. **INSTANCE.** Holding business meetings, acquiring property, receiving and paying out money, appointing of agents to make settlements, etc., can not be said to evince an assumption of distinctive corporate powers. *Id.*

4. **ENACTING BY-LAWS.** The passage of a by-law conferring upon the trustees the duty of keeping the church building in repair, heated and lighted, and intrusting them with the custody of the church property, and with power to sign deeds and mortgages, but only with consent of the congregation, is not a corporate act. *Id.*

5. **ATTEMPTED ORGANIZATION.** Whether if there had been an attempt at organization, such as signing articles of incorporation and a failure to record them, such acts would be regarded as corporate acts — not decided. *Id.*

6. **COURTS DIFFER.** The courts differ as to what are corporate acts; *Reichwald v. Comm'l Hotel Co.*, 10-203.

See **TITLE** having reference to the particular act inquired of.

CORPORATE ASSETS; see **ASSETS**.

CORPORATE BOOKS; see **CORPORATE RECORDS**.

CORPORATE CHARACTER.

1. **WHEN ADMITTED.** Where the defendant is sued as a corporation aggregate, the appointment of an attorney and an appearance entered by him, is an admission of record of the corporate character of the defendant; *Oxford Iron Co. v. Spradley*, 4-272.

See **CORPORATE EXISTENCE**; **ESTOPPEL**; **PLEADING**.

CORPORATE DEBTS.

1. **ASSIGNMENT, RIGHT OF ASSIGNEE.** The president and other officers of a corporation entered into a contract between themselves relative to debts of the corporation due to themselves, severally, and to others, and regarding the security for the same. The president assigned his interest in such contract to a third party not interested in the company. Held, such assignment gave the assignee no interest in the corporation or right therein, further than as assignee of a creditor of the corporation; *Hentig v. Sweet*, 10-413.

2. **COLLATERAL SECURITY — STATUTES OF LIMITATIONS.** Where indorsers of commercial paper, given by a corporation, hold securities belonging to the corporation as collaterals, and the commercial paper is never paid and becomes barred by the statute, the indorsers of such papers cease to have an interest in the securities, and should return them to the corporation. *Id.*

3. **CONTRACT.** By an agreement between the president and the vice president and treasurer, to all of whom the corporation was indebted, to the president in the smaller sum, it was agreed the vice president and treasurer should collect for all, and after paying themselves the excess of their claims over that of the president, should divide the remainder equally with him. The corporation became insolvent, and there was not enough to pay the excess mentioned. Held, no cause of action arose in favor of the president against the vice president and treasurer. *Id.*

4. **EFFECT OF, ON DIVIDEND.** There was a stipulation in the contract of subscription that there should be no assessment until the full amount was subscribed, but without dissent from any one, debts were incurred, and the property of the company mortgaged; held, that this change in the policy of the corporation did not require that all debts should be paid before preferred dividends might be declared; *Belfast etc. R.R. v. City of Belfast*, 10-534.

See **CONSOLIDATION**; **LIABILITIES**; **POWERS**.

CORPORATE DEED.

1. **MANNER OF EXECUTION.** The execution of a sealed instrument—as a lease—by the president of a private corporation, in his own name, for the company, is a good execution by the company, binding upon it and not upon the president who signs; *N. Wn. Distilling Co. v. Brandt*, 5-249.

2. **WHO EXECUTES IT.** If there be no statutory provision prescribing the mode of executing and acknowledging a corporate deed, the officer affixing the seal is the party executing it, within the meaning of statutes requiring deeds to be acknowledged by the grantor; *Kelly v. Calhoun*, 6-26.

3. **ASCERTAINMENT OF PARTIES.** When the question arises whether a contract executed by a corporate officer, is that of the company or of the officer, the court will look to the conclusion of the instrument, as well as the commencement, for the description of the parties bound by the deed; *N. Wn. Distilling Co. v. Brandt*, 5-249.

4. **DEED BY OWNER OF ALL THE STOCK.** While the title of certain real property was in a corporation, one King, who owned all the stock thereof, executed, in his own name, a deed of such realty. As respects the title of the association to such property, this deed is void upon its face and is, therefore, not a cloud upon its title; *Baldwin et al. v. Canfield*, 7-641.

5. **AS EVIDENCE.** The deed of a corporation, purporting to have been executed by its agent or attorney in fact, is not admissible in evidence without also producing the written evidence of the authority of such agent. Without this the deed is no evidence of title, but only color of title; *Standifer v. Swann & Billups*, 10-49.

6. OF CORPORATION. A deed of a corporation, signed by the president thereof, with its seal attached, will be presumed to have been well executed and binding and valid; *Smith v. Smith*, 4-366.

7. SUFFICIENT EXECUTION. If the testatum clause shall set forth that the company, as such, has caused its corporate seal to be affixed and the instrument to be signed by its president and secretary, and it is so signed and ensealed, and if the ensealing and delivery be attested by two subscribing witnesses, the deed will be executed; *Kelly v. Calhoun*, 6-26.

8. VALID ACKNOWLEDGMENT. Where the form of acknowledgment prescribed by statute is "personally appeared before me . . . the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained," a certificate of an officer taking the acknowledgment of the grantor, to a deed executed by a proper officer of a corporation, that said grantor is personally known to him, is sufficient compliance with the statute. *Id.*

9. REGULARITY OF. The execution of a deed — in this case a mortgage — under the seal of a corporation, regular on its face, by the properly constituted officers is prima facie evidence it was executed by the authority of the corporation. Parties objecting to it take upon themselves the burden of proving it was not so executed; *Wood v. Whelen*, 6-442.

10. VOID EXECUTION OF. A deed of real estate, the property of a corporation, executed, in the name of the corporation, by all the directors acting separately and not as a board and without authority from the board of directors, is held void as a conveyance and equally ineffectual as a contract to convey; *Baldwin et al. v. Canfield*, 7-641.

11. CLOUD OF VOID DEED. Holders of the stock of a corporation, whether holding as general owners or as pledgees, are interested in the preservation of the corporate property and in preventing it from passing out of the hands of the corporation. They have, therefore, a right to take legal means to preserve the corporate property and to prevent it from being lost to the corporation, or its value from being impaired. If such value is impaired by a cloud upon the title of the corporation to real property, they have a right to have the cloud removed. *Id.*

12. CLOUD ON TITLE. A deed executed by directors separately, and not as a board, purports, on its face, to be the deed of the corporation. Although it is not the corporate deed, that fact is not apparent, but the instrument is upon its face regular and valid. Whether it is so, in fact and law, depends upon the extrinsic consideration whether its execution was authorized by the board of directors. It, therefore, throws a cloud upon the title of the corporation. *Id.*

13. **DELIVERY.** Delivery of a deed need not be made by the grantor himself, nor is it indispensably requisite that it be made to the grantee. If delivery be made to any person for the use of the grantee, and is absolute and not on condition, his assent is presumed from the fact that the deed is beneficial to him. A controlling element in determining the delivery, as well as the acceptance of a deed, is the intention of the parties; *Thompson v. Candor*, 4-355.

14. **RATIFICATION.** The board of directors of a corporation may adopt, by resolution, an instrument (in this case a mortgage) which has been executed, originally, without authority, but which was executed in the name of the company, sealed with its corporate seal and signed by the proper officers. This will give the instrument full validity, as the deed of the corporation; *Wood v. Whelen*, 6-442.

15. **MISNOMER.** Where a deed is made to a corporation by a name varying from its true one, parties suing upon it may sue the company in its true name and aver in the declaration that the defendant company made the deed by the name therein mentioned; so, in such case, the corporation may sue in its true name and aver in the declaration that the defendant made the deed to it, by the name mentioned in the deed; *N. Wn. Distilling Co. v. Brandt*, 5-249.

16. **TO CORPORATION NOT DULY CREATED.** It is essential to a valid conveyance that there should be a grantee capable of taking. A deed which professes to convey real estate to a corporation, by name, which has no valid existence, is a nullity and passes no title to any one; *Douthitt et al. v. Stinson*, 8-178.

CORPORATE EXISTENCE.

1. **DEFINITION.** A general law (of Missouri) provided "whenver any corporation shall be organized under the laws of this state, it shall be the duty of the officers of said corporation to file, with the secretary of state, a copy of the articles of association or corporation, and the corporate existence of such corporation shall date from the time of filing said copy of such articles and a certificate by the secretary of state, under the seal of the state, that said corporation has become duly organized" (*Wagner's Stats.*, ch. 37, art. 1, § 4). The words "corporate existence," in this section, as used, mean full authority to transact business; *Hurt v. Salisbury et al.*, 8-101.

2. **CAN NOT DO BUSINESS WITHOUT.** Before a corporation can enter into a contract or transact business, it must have a full and complete organization and existence; *Gent v. Manufacturers etc. Ins. Co.*, 10-211.

3. —. Incorporators can not bring a corporation into being, or bind it by contract unless authorized by the charter. *Id.*

4. **LEGALITY OF, A QUESTION OF LAW AND FACT.** Whether a

corporation is legally constituted, involves questions of fact and of law. The things done under the statute, in and about the organization, are, of course, facts susceptible of direct proof, but, whether the things, when done, constitute a legal corporation, is a question of law; *Scanlan v. Keith*, **9**-143.

5. **POWER OF LEGISLATURE.** An act of the legislature incorporating certain persons, who have applied for a charter, and their associates may constitute the persons named a corporation at once, without further action on their part, either in the admission of associates, the choice of officers or the division of capital stock; *Harris v. Anglo-Saxon Petroleum Co.*, **3**-408.

6. **BY CHARTER.** When the legislative enactment, which provides for the incorporation of a body, names the trustees of the body and requires no act to be done by them, as a condition precedent, such a body is created *ipso facto et eo instante*, a corporation; *Blackwell v. State of Arkansas*, **6**-210.

7. **ACQUIRED UNDER GENERAL LAW.** It is a well settled principle that where a corporation must be formed under a general statute requiring certain acts to be done before it can be considered in being, its existence, if properly called in question, must be proved by showing compliance with the requirements of the statute; but, it is sufficient if a substantial compliance be shown; *State, ex rel. v. Beck et al.*, **9**-227.

8. **PRE-REQUISITES.** An association of persons can not claim a corporate existence, unless they shall have fulfilled the conditions precedent, prescribed by the statute authorizing their incorporation; *Workingmen's Accom. Bk. v. Converse et al.*, **7**-203.

9. **ESSENTIALS OF.** Under the constitution of Michigan there can be no chartered companies. All private corporations must be organized under general laws and can only be valid when strictly conforming to all conditions imposed; *Doyle v. Mizner et al.*, **6**-635.

10. —. By general statute of Michigan, concerning manufacturing companies, the proper acknowledgment of articles of association is required. Apart from any circumstances which might estop parties, by a recognition of an association *de facto*, so long as the articles of association are not duly authenticated they remain inchoate and imperfect to effect corporate existence. *Id.*

11. —. In respect to acts declared to be necessary steps in the process of incorporation, any material omission will be fatal to the existence of the corporation. Such omissions may be taken advantage of collaterally in any form in which the incorporation can be called in question. In respect of such acts as are required to be performed, but which are not made pre-requisite to the assumption of corporate powers, the incorporation is responsible only to the state in a direct proceeding; as to forfeit the charter. *Humphreys, impleaded etc., v. Mooney*, **6**-292.

12. **NON ESSENTIAL OF.** Where a general incorporation law required the filing of a certificate of the president and directors of a corporation in the office of the secretary of state, before it should commence business, it was held, that such filing is not a condition precedent to the legal existence of the corporation as such; *Augur Steel Axle, etc., Co. v. Whittier*, 7-443.

13. —. The statute of Wisconsin, relating to joint stock companies, does not make the publication and recording of the evidence thereof, of the articles of association, a condition precedent to corporate existence; *Harrod v. Hamer et al.*, 5-621.

14. **WHEN EXISTENCE COMMENCES.** Under statute of Illinois, of 1857, the signers of articles of incorporation did not become incorporated until the issue and acceptance of license from the clerk of circuit court; *Stowe v. Flagg*, 5-292.

15. —. In Kansas, incorporation is perfected when the certificate is filed with the secretary of state; *Hunt v. Kas. & Mo. Bridge Co.*, 5-374.

16. **WHEN ACQUIRED.** One Sanford as the owner of 2,965 shares, with seven others as the owners of five shares each, filed and recorded, in the office of the secretary of state of New Jersey, on the 28th day of October, 1856, a certificate in conformity with the sixteenth section of the banking act of New Jersey, which provides "upon making said certificate and causing the same to be recorded, as aforesaid, the said persons so associating, their successors and assigns, shall be, from the time of the commencement fixed in said certificate and until the time limited therein for the termination thereof, a body politic and corporate." The certificate expressed that the association should continue for twenty years from its date; the capital stock was stated to be \$20,000, and it also stated that Charles Sanford had been appointed president. No board of directors was elected, but the association proceeded to the business of banking. Held, that this constituted a corporation, which went into existence on the date of the filing of the articles of association; the associates claiming or assuming to be directors, without election and the certificate stating the appointment of president; *Rafferty, rec'r, v. Bank of Jersey City*, 3-571.

17. **ABORTIVE ATTEMPT TO ATTAIN.** Where parties attempt to incorporate but fail to comply with a general law which requires the filing of their articles of association in the office of the secretary of state, they acquire no corporate existence; *Richardson v. Pitts et al.*, 8-275.

18. **ARTICLES NOT FILED.** Where, under the general law, articles of association were duly acknowledged and recorded in the office of the recorder of the county where the corporation was located, in pursuance of statute (*Wagner's Stats., Mo., 333, § 2*), but were not filed with the secretary of state, as required by another provision of law, *supra*, the officers of the corporation had

no power to issue a note as the note of the company. Such note, issued and signed by them as directors, would bind them personally and not the corporation; *Hurt v. Salisbury et al.*, 8-101.

19. **EXTENSION OF, IS RE-ACQUIREMENT OF FRANCHISE.** Where a corporation is lawfully existing, under and by virtue of a general incorporation law, and a new, or revised, incorporation law is adopted, under which it may proceed, act, and extend the period of its corporate existence, when the corporation shall have conformed to the requirements of the latter law, it will acquire all the rights and powers granted by the new law; notwithstanding terms of limitation in the law of its original organization; *People, by the Att'y Gen., v. Pfister et al.*, 6-272.

19½. **REPEAL OF GENERAL LAW.** The repeal of a general incorporation law, by a statute substantially re-enacting and extending its provisions, does not terminate the existence of corporations organized under it; *United Hebrew Benefit Ass'n v. Benshimol*, 7-536.

20. **EXISTENCE CONTINUED TO WIND UP.** It is the settled policy of the state of Illinois, so far at least as concerns domestic corporations, that upon their dissolution, however that may be effected, that they shall be regarded as still existing for the purpose of settling up their affairs and having their property applied to the payment of their just debts. No reason is perceived why the same policy should not, so far as practicable, be extended to foreign corporations owning property within the state and located herein for business purposes; *Life Assoc. v. Fassett*, 9-119.

21. **TERRITORIAL LIMITATION.** A corporation has no existence or power beyond the jurisdiction of the state by the laws of which it is created, except so far, and under such restrictions and conditions, as may be recognized by the laws and comity of other states; *Folger v. Columbian Ins. Co.*, 3-387.

22. —. A corporation can have no legal existence out of the boundary of the state, or the sovereignty which created it; the exercise of any power in another state depends upon the will of that sovereignty; *Gill's adm'x v. Kentucky etc. Mining Co.*, 3-346.

23. **ITS COMMENCEMENT.** The life of a corporation dates from its organization, and not from the time it commences to do business. The insertion in the charter of a power to act outside the state creating the company does not invalidate the grant, and the fact that the corporation first commences to do business in a foreign state (the laws of which do not prohibit such business) is immaterial; *Hanna & Finley v. International Petroleum Co.*, 5-593.

24. **ITS END; EFFECT.** Upon dissolution the existence of a corporation, as a legal entity, is ended. Judgment can no more be rendered against it, in a suit previously commenced, than judgment can be rendered against one who dies *pendente lite*. All

pending suits abate, unless there is a prolongation of corporate life, for this specific purpose, granted, by the sovereignty, as in the case of original creation; *Nat. Bank v. Colby*, 5-82.

25. **GENERAL LAW.** A general law limited the existence of every corporation to the period expressed in its charter, or, if no limitation was expressed in such charter, then to the term of ten years. Six days later an act passed incorporating a company, without limiting its existence. The corporation was limited to ten years of existence; *Krutz v. Paolo Town Co.*, 7-124.

26. **COLLATERAL ATTACK.** The legality of an incorporation can not be attacked collaterally; *M'Carthy v. Lavasche*, 6-419.

27. **ASSUMING TO ACT—COLLATERAL ISSUE.** Where persons assume to incorporate under the laws of the state, and assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such association to a corporate existence, although there has not been a full compliance with the provisions of the statute; *Hudson v. Green Hill Seminary*, 10-259.

28. **NOT TO BE COLLATERALLY ASSAILED.** When an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, its existence as a corporation can not be inquired of collaterally. Persons transacting business with such association can not be heard to deny, or to assail, the legality of corporate existence; *Central Agricultural and Mechanical Association v. Alabama Gold Life Ins. Co.*, 9-8.

29. —. Where the law authorizes the incorporation of an association, and there is an attempt, in good faith, to organize, and corporate functions are thereupon exercised though some formalities, required by law in the organization, have been omitted, there is a corporation *de facto*, the legal existence of which can not, ordinarily, be questioned collaterally; *Williamson v. Kokomo Building and Loan Fund Association*, 9-301.

30. **INSTANCE.** A building association filed its articles of association in the proper recorder's office and a certified copy, instead of a duplicate, as the statute required, in the office of the secretary of state, and then assumed the exercise of corporate functions and took a mortgage. It was held, by the supreme court of Indiana, that a junior mortgagee could not question the corporate existence, for the purpose of defeating the mortgage of the association. *Id.*

31. **COLLATERAL ATTACK.** It is well settled that a corporation can be judicially determined to have ceased to exist only in a suit to which the commonwealth is a party; *Briggs v. Cape Cod Ship Canal Co.*, 10-568.

32. **IMPEACHMENT OF.** Whether an incorporated company was or was not properly organized, according to its charter, is a question that can not be made collaterally, but must be made by a

direct proceeding against the corporation; *Gill's adm. v. Kentucky etc. M'g. Co.*, **3**-346.

33. ORGANIZATION. As in favor of creditors and third persons dealing with a corporation in good faith, the regularity and validity of its organization, effected under color of its charter, can not be impeached; and, the acts of its officers who are officers de facto, under color of an election, are binding upon the corporation; *Hackensack Water Co. v. DeKay et al.*, **9**-559.

34. INQUIRY INTO LEGALITY OF. If a corporation shall have come into existence wrongfully, one who has aided in procuring it to exist and who thereafter, by paying installments on his stock subscription, enables it to transact business and exist lawfully, waives the original wrong doing, and, as rights of third parties attach from the moment of the transaction of business, the subscriber to stock may not withdraw his subscription, either to the prejudice of a creditor or the corporation; nor may he deny the legality of existence; *Lehmann, Durr & Co. v. Warner*, **9**-135.

35. DENIAL OF. Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation; *Indianapolis Furnace and Mining Co. v. Herkimer*, **5**-353.

36. WHEN NOT TO BE IMPEACHED. Where a company has incorporated according to the forms required by law and entered on and exercised its corporate powers and the fulfillment of its purposes, it has become a corporation de facto as to parties dealing with it, and its existence as a corporation can not be collaterally drawn in question; *Laffin & Rand Powder Co. v. Sinshaimer et al.*, **7**-375.

37. HOW QUESTIONED. Where persons in good faith act under a corporate name and exercise the rights and franchises of a corporation authorized by law, they become a corporation de facto, and a private citizen, though a stockholder therein, can not maintain a suit to inquire into its legal existence. Such proceeding can only be brought on behalf of the state by the proper prosecuting officer; *North v. State*, **7**-359.

38. HOW ATTACKED. By code of Mississippi (Rev. Code, § 683) there can be no attack on the character in which a corporate plaintiff sues, raising the question of due organization, save by a verified plea denying the corporate existence; *Selma etc. R.R. Co. v. Anderson*, **8**-27.

39. HOW DENIAL OF, AVAILABLE. It is the settled law of the state of Maine, that the non existence of a plaintiff corporation can only be taken advantage of by plea in abatement. It can not be set up as a ground of defense, by a brief statement filed with a plea in bar, nor can it be given in evidence under the general issue; *Inhabitants of School Dist. v. Aetna Ins. Co.*, **7**-280.

40. WHEN TO BE PROVED. In an action by a private corporation upon a promissory note, given upon a subscription to the

capital stock of the company, a plea of null corporation being interposed, it behooves plaintiff to prove its corporate character and use under its charter; *Ramsey v. Peoria Marine & Fire Ins. Co.*, **3**-271.

41. **WHEN TO BE PROVED.** By the statute of New York it is provided that in suits brought by or against a corporation created by or under the laws of that state, it is not necessary to prove, on the trial of the cause, the existence of such corporation, unless the defendant shall have alleged in answer to the action that the plaintiff or defendant, as the case may be, is not a corporation; *Stone v. Western Trans. Co.*, **3**-602.

42. **WHO CAN NOT DENY.** Where there has been an attempt to create a corporation, a general law authorizing incorporation has been, in part at least, complied with; after an assertion and exercise of corporate powers and a contract with an individual, the right to corporate existence can not be tried in an action instituted by such individual, in his own behalf, for the purpose of annulling the contract. In such case the right to possess and enjoy corporate franchises can be questioned only by the state, in a direct proceeding; *Baker et al. v. Neff*, **7**-106.

43. **WHO MAY NOT QUESTION.** Appellant was one of the original subscribers to the capital stock of a corporation and, as such, had been elected and served as a director. These facts preclude him from objecting to the legality of the organization of the company. His acts as a director, implying that it was a corporation, estop him from denying its incorporation. A party who has contracted with a corporation de facto, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue. Such objections, if valid, are only available on behalf of the sovereign power of the state; *Ramsey v. Peoria etc. Ins. Co.*, **3**-271.

44. **DOCTRINE OF ESTOPPEL.** In ordinary cases, the recognition of corporate existence by dealings with the corporation will estop from questioning it. Where, however, no new rights have intervened and the recognition is brought about by fraudulent dealings, carried on for the purpose of entrapping a party into the action on which the recognition is based, there is no room for an estoppel; *Doyle v. Mizner et al.*, **6**-635.

45. **ESTOPPEL OF ONE DEALING WITH.** When the action is against one contracting with a corporation, in its corporate capacity, the contract furnishes the evidence of corporate existence. If the action be against a stranger, the user of the corporate power and franchise and the color of right to use, is conclusive of corporate existence; *Lehmann, Durr & Co. v. Warner*, **6**-155.

46. —. Parties who contract with a corporation, whether by subscription for its stock or by promissory note, bond, mortgage, or other form of contract, are estopped from denying the existence of the corporation. *Id.*

47. **ESTOPPEL OF ONE DEALING WITH.** In an action to foreclose a mortgage given to a corporation for money loaned, the defendant is estopped to deny the regularity of the incorporation or its power to make the loan; *Grangers Business Ass'n v. Clark*, 10-80.

48. —. The maker of a note, payable to a payee named as a corporation (in this case a savings bank), is estopped, in an action on the note, to deny that the payee is a corporation; *Stoutimore v. Clark et al.*, 8-238.

49. —. Conceded, one executing a note to a body purporting to be a corporation is estopped to deny its corporate existence; he can not avoid the estoppel by an answer alleging a subsequent discovery that the payee in the note named was not such corporation; *Ransom v. Priam Lodge, No. 145, Free and Accepted Masons*, 7-52.

50. —. A party who has recognized an association claiming to be a corporation, by dealing and contracting with it, is deemed to have admitted its legal existence, in an action on contracts made upon the faith of such transactions; *French et al. v. Donohue*, 9-489.

51. —. Where the evidence shows an attempt to incorporate under the laws of a state — which laws authorize such incorporation — the assertion of corporate existence and that a party has contracted with the association as a corporation, such party will not be in a situation to deny its corporate existence. The question as to whether there was a right to exercise corporate powers is a question to be litigated only in a direct proceeding; *Smelser v. Wayne & Union Straight Line Turnpike Co.*, 9-238.

52. —. Whoever contracts with a corporation having a de facto existence, and the reputation of a legal corporation in the actual exercise of corporate powers and franchises is estopped from denying the legality of the existence of the corporation or inquiring into irregularities attending its formation, to defeat the contract, or to avoid the liability he has voluntarily and deliberately incurred; *Central Agric. & Mech. Ass'n v. Alabama Gold Life Ins. Co.*, 9-8.

53. —. A person who deals with an association claiming to be a corporation and, in so doing, recognizes its corporate existence, can not escape liability by denying that there was any such corporation. In such case, it is not necessary there should be an express contract directly recognizing corporate existence. It will be sufficient if the acknowledgment is fairly to be implied from the contracts and the course of dealing between the parties; *Smelser v. Wayne & Union Straight Line Turnpike Co.*, 9-238.

54. —. One who contracts, by deed, with a corporation, as such, is estopped to assert that there is no such corporation; *Baker v. Neff*, 7-106.

55. —. One having made a contract with a company in its

corporate name, admits that it is a duly constituted body politic and corporate, at the time of the execution of the contract and is estopped from setting up, for defense, the non allegation of the fact of corporate existence in suit, by the corporation, brought on the contract; *Nat. Ins. Co. v. Bowman et al.*, 8-141.

56. **ESTOPPEL OF ONE DEALING WITH.** Upon objection being made that no board of directors was regularly elected, for a banking corporation, organized under the banking act of New Jersey, the purpose being to cause the assets of the corporation to be treated as the individual assets of those interested in the bank, to relieve defendants from the consequences of obtaining assets of an insolvent corporation, after notice; held, that defendants having for a considerable length of time dealt with the bank as such and not with the associates as individuals, they are estopped from denying the corporate existence and can not be allowed to appropriate such assets to the detriment of others equally entitled; *Rafferty, rec'r, v. Bank of Jersey City*, 3-571.

57. **WHEN NOT APPLICABLE.** Where no new rights have intervened and corporate existence has been recognized only by reason and means of fraudulent dealings, carried on for the very purpose of entrapping a party into the acts on which such recognition is based, the rule does not apply. In such case if there be, in fact, no legal corporation and no fact to make it unjust, in law, to deny corporate existence there is no room for estoppel; *Doyle v. Mizner et al.*, 6-635.

58. **PARTICIPATION IN ITS AFFAIRS.** Where one participates in all proceedings to create a corporation, in increasing its stock and in making calls on the subscriptions, both as stockholder and director, he can not be heard to deny the validity of such proceedings in a suit against him to compel payment of calls on stock subscribed for; *Kansas City Hotel Co. v. Harris*, 8-89.

59. —. Where one has acted as president of a corporation, participated for months in its transactions, and held it out to the world as being legally organized and lawfully acting, nevertheless the whole of its capital stock was never subscribed, as required by the law of its creation, he will be held estopped from setting that fact up as a defense for the purpose of showing that the company could not act as a corporation or enter into contracts on which he could be made liable by law; *Corwith et al. v. Culver*, 5-244.

60. —. Acceptance of the office of treasurer of a church association will not estop the incumbent from denying its corporate existence, in the absence of proof of corporate acts; *Fredenburg v. Meth. Epis. Ch.*, 6-605.

61. **ESTOPPEL OF COMPANY.** In a suit, by attachment, against a foreign corporation, where defendant voluntarily appears and gives bond in its corporate name, the company is, thereby, estopped from denying its corporate existence; *Smith & Boland v. Burlington & Wisconsin R.R. Co.*, 8-118; *Seaton v. Chicago*,

Rhode Island & P. R.R. Co. (note), 8-118; Witthouse *v.* Atlantic & Pacific R.R. Co. (note), 8-118.

62. ESTOPPEL AS TO THE STATE. That the state has instituted a criminal prosecution for breaking down a toll gate, described in the indictment as the property of a corporation named, is no bar to an information to contest the valid organization or existence of the supposed corporation; State, *ex rel.*, *v.* Beck et al., 9-227.

63. ADMITTED. In a suit by a corporation on a promissory note given to it in its corporate capacity, by defendant, it is not ground of demurrer that plaintiff failed to allege that it was, at the date of the note, a corporation etc. Defendant having entered into the contract with the company in its corporate name, thereby admitted it to be duly constituted a body politic and corporate; Farmers & Merchants' Ins. Co. *v.* Needles, 8-92; Studebaker Bros. Manuf. Co. *v.* Montgomery (note), 8-92.

64. —. A subscription read: "We, the undersigned, agree to subscribe the number of shares, of \$50 each, to the capital stock of the Mount Sterling Coal Road Company." A direct admission of corporate existence; Lail *v.* Mt. Sterling C. R. Co., 7-172.

65. WHEN ADMITTED. In an action at law the failure to prove corporate character is obviated by the proof of the dealings of parties recognizing it; Chapman *v.* Colby Bros. & Co., 7-578.

66. —. A corporation by appearing to a suit, thereby admits its corporate existence; Missouri River etc. R.R. Co. *v.* Shirley, 7-139.

67. ADMISSION OF, IN PLEADING. The plea of the general issue, in a suit by the corporation, admits corporate existence and the competency of the plaintiff to sue as a corporation; Pullman *v.* Upton, 6-34.

68. —. Corporate existence is admitted by a complaint against a party named as a corporation; State *v.* Indep. Sch. Dist., 6-522.

69. PLEADING. A defendant, sued as a corporation, can not deny its own capacity, by a plea, either alone or with pleas in abatement or in bar. If it be not a corporation it can not, as such, be present in court or plead; Western Un. Tel. Co. *v.* Eyser, 5-161.

70. —. Upon an unconditional promise to pay to a corporation a certain sum of money, either as an ordinary debt or as a subscription to its capital stock, it is not necessary to aver that the necessary amount of stock has been subscribed in order to show corporate existence; Lail *v.* Mt. Sterling Coal R. Co., 7-172.

71. —. On such a promise the undertaking admits corporate existence. If the corporation has ceased to exist, or never was incorporated, the defense, to be available, must be pleaded, nul tiel corporation. *Id.*

72. **DENIAL OF CORPORATE EXISTENCE.** Action by a corporation. An answer denying knowledge or information sufficient to form a belief as to whether plaintiff is a corporation, imposes, on plaintiff, no necessity of proving its corporate existence; *Nat. Bk. v. Loyhed*, 8-11.

73. —. A general denial, or plea of the general issue, does not put in issue the corporate existence of a corporate plaintiff; *Nat. L. Ins. Co. v. Robinson*, 8-325.

74. —. In a complaint, of a turnpike company, for the recovery of a subscription to capital stock of the corporation, an allegation of the date of the filing of its articles of association sufficiently shows the date of its corporate birth; *Washer v. Allensville etc. Turnpike Co.*, 9-223.

75. —. A statute (of Mass., 1851, ch. 113) providing that when it appears from the pleadings in any suit, that either party sues, or is sued, as a corporation, such fact shall be taken as admitted, unless the party controverting it shall file in court, within ten days from the time allowed for answer, a special demand for proof of the fact, does not apply to an action in which the plaintiff sues as a corporation and in which an answer denying each and every allegation in the writ and declaration has been filed and more than ten days have elapsed, after the time allowed for answer, before the passage of the statute; but, it is incumbent on the plaintiff, to prove the existence and organization of the alleged corporation; *Goodwin Invalid Bedstead Co. v. Darling*, 9-436.

76. —. In suit instituted, by a corporation, an averment that plaintiff is a corporation, duly incorporated under and by virtue of an act of the general assembly of the state of Missouri, entitled etc. sufficiently alleges plaintiff's corporate existence; *Chillicothe Sav. Assoc. v. Rueger et al.*, 8-140.

77. **INFORMATION; QUO WARRANTO.** An information against parties acting as a corporation, charging it not to be legally organized and praying its dissolution, is bad if brought against the corporation by name; *Mud Creek Dr. Co. v. State*, 5-337.

78. **PRESUMED.** Under the statute in Michigan, a religious society, that in good faith has for ten years exercised corporate powers, bought and sold property, etc., will be treated as a legal incorporation, though the proceedings to incorporate are in themselves fatally defective; *Trustees v. Webber*, 10-636.

79. **PROOF THEREOF.** The execution of a note or mortgage to a corporation, as such, is sufficient *prima facie* evidence of the existence of the corporation, and no further proof thereon is necessary until such existence is questioned. This is a rule of evidence rather than of the doctrine of estoppel; *Brown v. Scottish Am. Mtg. Co.*, 10-233.

80. —. Where in a suit against a corporation the evidence to prove the claim, at the same time, amounts to evidence that the defendant was doing business in the name by which it was sued,

and there is no countervailing evidence, this is sufficient proof of the corporate existence of defendant under a statute providing that evidence that a company is doing a business under a certain name, shall be *prima facie* proof of its due incorporation, or existence, pursuant to law, and of its name; *Lake Superior Building Co. v. Thompson*, 5-186.

81. **PROOF THEREOF.** If a corporation be in the exercise of corporate power, possessing and enjoying corporate franchises under color of right — as when there is a legislative grant under which these are claimed — a private person can not be heard to inquire into the legality of corporate existence; but, only the state; *Lehmann et al. v. Warner*, 6-155.

82. —. Corporate existence of a church association is not proved by evidence that the members held the ordinary meetings of a church society and elected officers; *Fredenburg v. Lyon L. M. Epis. Ch.*, 6-605.

83. **PROOF OF, ON APPEAL FROM JUSTICE.** In the absence of evidence to the contrary, it is presumed that the defendant in a suit before a justice of the peace pleads the general issue, and the plaintiff being a corporation, such plea admits its corporate capacity. It follows, on appeal to the circuit court, in such case, plaintiff is not required to prove its incorporation; *Farmers & Drivers' Bank v. Williamson et al.*, 8-147.

84. **PROOF OF; FOREIGN CORPORATION.** It is not error, of a trial judge, to exclude a certified copy of articles of incorporation, purporting to be in pursuance of the general statutes of a sister state, the same not being accompanied by proof of the enabling statute and not being properly certified and authenticated, either under state or federal law; *French et al. v. Donohue*, -9489.

85. —; **ACTION AGAINST A FOREIGN CORPORATION.** By exhibiting a certificate of its incorporation, duly and properly authenticated, a foreign corporation answers a claim that its stockholders are liable as members of an unincorporated association. In a proceeding by an individual — a person other than the government that created it — no proof aliunde the certificate is admissible to impeach corporate existence; *Lafin etc. Co. v. Sinsheimer et al.*, 7-375.

86. **EVIDENCE OF CONTINUED EXISTENCE.** A continued user of the franchises of an incorporated and organized company, by persons assuming to act as the directors and officers of such company — persons in the actual possession and exercise of such franchises, and in possession and control of the company's records and who have carried on its business without any objection — is competent evidence of the continued corporate existence of such company and that the persons who thus claimed to be its directors, and acted as such, were its legal directors; *St. Paul F. & Mar. Ins. Co. v. Allis et al.*, 7-616.

87. **HOW ESTABLISHED.** Where a corporation is created by

statute, or under a general law, which requires certain acts to be performed before it can be considered in esse, then those acts must appear to have been done in order to establish the corporate existence; *Lord et al. v. Essex Building Association*, No. 4, 4-434.

88. **HOW CONTROVERTED.** A general statute regulating the formation of corporations, provided (but not as a condition precedent to corporate existence) for the declaration in the articles of association of the number of shares, not exceeding 1,000, and the par value of the same, not exceeding \$400 per share. An association organizing, provided that the number of its shares should be indefinite. This can only be made cause for affecting the corporate existence, by direct proceeding, taken at the instance and in the name of the state, alone. *Id.*

89. **WRONGFULLY ASSUMING.** While persons assuming to act in a corporate capacity are liable as partners to those with whom they contract, to charge any one of them as such it must be shown that he was acting in that capacity at the time the contract sued upon was made, or that, upon some consideration, he agreed to become liable; *Fuller v. Rowe*, impleaded, etc., 4-615.

90. **EVIDENCE CONCLUSIVE OF.** Courts are bound to regard a company, which exhibits certificate of its due incorporation, according to all the forms required by the law of its creation, as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding in behalf of the government which created it: *Lafin & Rand Powder Co. v. Sinsheimer et al.*, 7-375.

91. —. Defendant Sweet, claiming to be president of a corporation duly organized, employed plaintiff to act as its superintendent. Appellant, supposing the company to be legally incorporated, subscribed and paid in \$5,000, and was elected president. At his election he notified plaintiff, and plaintiff thereafter drew drafts upon him, as president, which were honored by the treasurer. The business proving unprofitable, it was abandoned. Rowe directed the transfer of the books for safe custody. No corporation had, in fact, existed. It did not appear Rowe was cognizant of the fact that there was not a legal incorporation until the date of abandonment of the business. Action to recover plaintiff's salary. Rowe was not liable; *Fuller v. Rowe*, 4-615.

92. **WHEN NOT SUBJECT TO REVIEW.** It is manifestly improper on the part of an inferior tribunal, sitting for the assessment of damages caused by the expropriation of property, under laws of eminent domain, to pass upon questions of corporate existence and the right to exercise corporate franchises; *Schrøder, relator, v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 6-653.

93. **WAIVER.** The commonwealth may waive a strict compliance with the terms of the act of incorporation, and may elect

whether it will insist upon a forfeiture if there has been a breach of condition; *Briggs v. Cape Cod Ship Canal Co.*, 10-568.

94. **WAIVER OF FORFEITURE.** Although a corporation has engaged in another and different business than that provided in its charter, so that a forfeiture of its franchise may have been declared, yet, if the legislature during the existence of such ground of forfeiture has passed a law amending the act under which it was organized, in which its corporate existence and its acquisition of real estate is recognized, its powers enlarged and new ones conferred, such amendatory act will be construed as granting a new charter, and a waiver of any ground of forfeiture; *People v. Ottawa Hydraulic Co.*, 10-279.

95. **CRIMINAL LAW; EVIDENCE OF.** On the trial of a criminal cause, the existence of a corporation may be proved by general reputation, a de facto existence is all that need be shown; *State v. Thompson*, 7-159.

96. —. On trial of an indictment against an agent of a corporation, the incorporation may be shown by parol; *State v. Cheek*, 8-185.

97. —. It is competent, on the trial of an indictment, to prove that a corporation (averred to be the party injured) existed, by testimony that it was known and acting as a corporation; *Norton v. State*, 7-109.

98. —. Prosecution for malicious injury done to corporate property. It is not necessary that the state shall prove the organization of the company. That it was known, recognized and operating as such is sufficient; *Franklin v. State*, 9-257.

99. **PRESUMPTION OF, IN CRIMINAL CAUSE.** On the trial of an indictment, for trespass upon real estate, as between a corporation and the party accused and all other persons except the state, it may well be presumed, after the lapse of twenty-four years of assumed corporate existence, that the party injured, named as a corporation is such; at all events, a want of legal corporate existence can not be shown collaterally in such prosecution, nor be made an available defense to it; *White v. State*, 7-101.

100. **JUDICIAL COMITY.** When the question is presented in the supreme court of the United States, whether, under the constitution and laws of a particular state, a company, professing to be a corporation, is legally so, this court will receive, as conclusive of the question, the decision of the highest court of the state deciding, in a case identical in principle, in favor of the corporate existence; *Secombe v. R.R. Co.*, 5-108.

CORPORATE FRANCHISE.

1. **DEFINED.** A franchise may be defined as a certain privilege of a public nature, conferred by grant from the government and vested in individuals. It is a sovereign prerogative and vests in

an individual only by virtue of a legislative grant; *Truckee & Tahoe Turnpike Road Co. v. Campbell*, 4-287.

2. **WHO MAY GRANT.** It makes no difference whether the grant of a franchise be made directly by the legislature, or by a subordinate body to which the power is delegated. It is still a grant emanating from the sovereign authority of the state. *Id.*

3. **TOLLS.** The right to collect tolls on bridges, roads etc. is a franchise. *Id.*

4. **A GRANT; IMPEACHMENT OF.** A grant regularly made by a board of supervisors has the same standing in respect to its validity, the same presumptions in its favor, and the same privilege as to the mode in which it may be attacked, as a grant of any other right, privilege or thing made by any department of the government under the authority of law. The grant is not liable to be attacked by a private person, or in a collateral proceeding, for mere error in the exercise of the authority to make the grant. *Id.*

CORPORATE FUNDS.

1. **TRUST FUND.** The funds of a corporation are held in trust to pay the debts of the company; *Lyman v. Bonney et al.*, 7-445.

2. **TREASURER.** The treasurer of a corporation is the officer charged, by law, with the custody of its funds and made responsible for their safe keeping. The directors can not, lawfully, deprive the corporation of this responsibility by depositing the funds with others for safe keeping or causing such disposition of the funds to be made. They may be restrained from so doing, by injunction, at the suit of any stockholder, who makes a proper case; *Pearson v. Tower*, 5-540.

3. —. The treasurer of an association can not set up, in defense to an action, of members of the society, to recover the funds of the association, that the purpose and object of the society are unlawful; *Wilson v. Owens*, 5-469.

4. **ASSENT OF DIRECTORS TO EXPENDITURE.** If a corporation binds itself to the payment of money upon condition subsequent, and places the sum thereof into the hands of its treasurer, in readiness to meet the obligation, and such treasurer expends the same for the benefit of the obligee in the bond, with the assent of the president and directors of the corporation, entered of record, this will bar recovery, by the corporation, of the sum so delivered to the treasurer; *Bay View Homestead Assoc. v. Williams et al.*, 6-224.

5. **MISUSE OF FUNDS.** It is not competent for the directors of a corporation to use its funds in payment of a note, executed by themselves, to the president of the corporation, as payee, for its benefit; *Gallery v. Nat. Exch. Bk.*, 6-632.

6. **OMISSION TO RECORD ASSENT.** When a corporation, by its proper officers, formally assents to the expenditure of money from

its funds, but by some neglect, or oversight, of its secretary, no record entry is made of such assent, or if, for any cause deemed sufficient by such officers, the corporation postpones the formal entry of such assent upon the record, the assent will bar recovery of moneys paid pursuant thereto; *Bay View Homest. Assoc. v. Williams*, 6-224.

7. MISAPPROPRIATION OF; REMEDY. The remedy of a creditor, who complains of the fraudulent misappropriation of corporate funds, whereby the company becomes insolvent and he is damaged, is by a proceeding in the nature of a creditor's bill, where, all the parties in interest being brought in, the court may compel an accounting and distribute proceeds according to justice and equity; *Reed v. Goldstein et al.*, 6-247.

8. JURISDICTION OF EQUITY. When persons have ceased to be officers of a corporation and the only complaint against them is of an appropriation of corporate funds to their own use, and no discovery is sought, the reasons for seeking the aid of equity — which commonly exist in cases of breach of trust — are wholly wanting. Courts of law are adequate to relieve and are the most suitable tribunals; — equity stands by; *Bay City Bridge Co. v. Van Etten et al.*, 6-601.

9. —. A bill for injunction being exhibited, by a subscriber to stock, complaining that a corporation and its directors were keeping the funds of the company in a manner not authorized by the charter and by-laws and so as to endanger their safety, a general demurrer, *ore tenus*, was interposed. It was overruled, as admitting the charge; *Pearson v. Tower*, 5-540.

See ASSETS.

CORPORATE LIABILITY; see LIABILITY; PERSONAL LIABILITY.

CORPORATE NAME.

1. WILL BE PROTECTED. Where the name of a manufacturing corporation has been used, to designate the origin and ownership of the goods manufactured by it, such use of its name will be protected, upon the same principle and to the same extent, that individuals are protected in the use of trade marks; *Holmes et al. v. The Holmes, Booth & Atwood Manufacturing Co.*, 3-210.

2. USE OF STOCKHOLDERS' NAMES. Where a corporation, with the consent of some of its stockholders, have embodied their names in the corporate name, the right to use the name so adopted will continue during the existence of the corporation. *Id.*

3. USE OF NAME BY RIVAL CORPORATION. Stockholders who have permitted the use of their names, in the corporate name of one company, must use their own names subject to the rights of that corporation, unless relieved of that inconvenience by its consent. A rival corporation, subsequently formed and embracing

such stockholders, will have no right to so use their names as to mislead those who deal with them into the belief that the two companies are the same. *Id.*

4. **USE OF FAMILY NAME.** A statute (Rev. Stat., Mo., § 762) provided that no certificate of incorporation should issue to any company, where the corporate name and style assumed is the name of a person or firm, unless there be joined thereto some word designating the business to be carried on, followed by the word "company" or "corporation." A family name, not conjoined with a given name, is not the name of a person, within the meaning of the statute. Hence the name "Mallinckrodt Chemical Works" does not come within the statutory requirements; *State of Missouri, ex rel., v. M'Grath, secretary of state*, 9-519.

5. —. The object of the statute is to prevent corporations from conducting business in the name of firms and individuals, thereby misleading the public into the belief they are dealing with individuals and are entitled to the protection offered by their personal liability. *Id.*

6. **USE BY TWO COMPANIES.** A company claiming to have been incorporated, in the state of Michigan, transacted business in Illinois under the name it had assumed. Later a corporation was organized, in Illinois, adopting the name the other was acting under. It commenced business in the same city where the other company was already established. The company last formed sought to restrain the persons composing the other company from continuing to do business under the common name, alleging that the foreign corporation had ceased to exist. It was held this was no good ground upon which to proceed. If defendants no longer had corporate rights, or if their incorporation was originally illegal, they had, at least, as much right to use the name assumed as complainant and might still prosecute their business as partners, under the name they had adopted; *Ottoman Cahvey Co. v. Dane et al.*, 6-460.

7. **TWO CORPORATIONS WITH LIKE NAMES.** Plaintiff sued a corporation as being organized under the statute of Missouri. It was set up, in defense, that its managing officers were, at the time of making the contract declared on, acting in behalf of a foreign corporation bearing the same name. It was held that plaintiff had a right to presume that the company was lawfully acting in pursuance of authority derived from the local statute; the more so that the same persons were the managers of both companies; *Dean v. La Motte Lead Co.*, 8-138.

8. **VARIANCE.** While it is true that to sustain a grant, or that under the operation of the doctrine of estoppels, a variance in the name of a corporation may be disregarded, it is otherwise as to an act done by a corporation for its own benefit, in accordance with the requirements of a statute; *Glass v. Tipton, Tetersburgh & Berlin Turnpike Co.*, 1-377.

9. **VARIANCE IN PLEADING.** In an action by a corporation on an indemnity bond, the complainant alleged the name of the corporation had been changed since the date of the writing obligatory. The complainant, by amendment, averring such change of name, it was held that the bond was admissible evidence; *West et al. v. Carolina Life Ins. Co.*, **6-190**.

10. **IDENTITY; VARIANCE.** A banking association described itself, in an action brought upon a note, as "The Washington County Bank, a corporation duly established by law and doing business in Greenwich, in the state of New York." To prove its corporate existence it introduced an organization certificate of "The Washington County National Bank of Greenwich," to be "located . . . in the town of Greenwich, county of Washington, and state of New York," as well as a certificate of the controller of the currency of the due organization of "The Washington County National Bank of Greenwich, in the county of Washington and state of New York." In the absence of evidence of the existence of any other bank named the Washington County National Bank of Greenwich, the evidence warranted the inference that the organization proved was that of plaintiff; *Washington County Nat. Bk. v. Lee*, **5-440**.

11. **IN SUIT.** A corporation may be known in its public proceedings by several names, as individuals may, and may be sued by a name substantially answering its true appellation; *East Tennessee & Georgia R.R. Co. v. Evans*, **4-186**.

11½. **IN LEGISLATION.** A discrepancy between the correct corporate name of a defendant corporation, as given in the original charter and the name used in a special law amending the charter was held of no consequence, in view of the clear intention of the legislature; *Cotton v. Miss. & Rum R. Boom Co.*, **7-603**.

12. **PLEA OF GENERAL ISSUE; EFFECT.** The plea of the general issue by a defendant sued in a corporate name is, in effect, under the statute of Michigan, an admission that it is sued by the right name; *Lake Superior Building Co. v. Thompson*, **5-186**.

13. **CHANGE OF; BY AMENDMENT OF CHARTER.** A railroad company having been incorporated, with its purposes defined, by subsequent legislation its name was changed. This was not a fundamental change; it was the same company with a different name, although it received the right to change its location a few miles, the general purpose and direction of the road being the same. The mere change of names does not and can not change things or their properties; *Town of Reading v. Wedder*, **4-371**.

14. —. An act of the legislature, providing that any university, or college, organized and incorporated under the provision, of any special charter, etc., may, by a majority of its board of directors change its name, if done before a day stated, is not unconstitutional. It is not a local law; it does not amend the

charter ; nor does it create a new corporation ; *Hazelett v. Butler University*, 9-252.

15. PLEADING ; COMPLAINT. In a suit brought by a university which had changed its name under such an act, last above described, it is sufficient, in alleging such change, to aver that it was made by a vote of a majority of the directors within the time limited, without stating the name of the directors, the number of votes cast, etc. *Id.*

16. EFFECT OF CHANGE OF. An act of the legislature permitting a railroad company to change its name "and that of its branches, or any division or portion of its roads" by resolution of its board of directors, sanctions nothing other than a change of name. The change of name does not create a new or distinct corporation nor effect a change of responsibility. Wherefore suits against the company must be in the new corporate name and not in that of any of its branches or any division or portion of its road ; *Morris v. St. Paul & Chic. Ry. Co.*, 4-501.

17. —. An act of the legislature, changing the name of a corporation and continuing it, under the new name, in all the rights, honors, privileges, and immunities it possessed under its original charter and ancient name, has no effect to revive provisions of such original charter — as a provision exempting it from taxation — which has been repealed by prior charter amendments accepted by the company. If this were otherwise the reviving act, if passed subsequently to a general law having relation to the matter, would interpose no constitutional barrier to the taxation of the company like natural persons ; *Macon & Augusta R.R. Co. v. Goldsmith, comptroller general*, 7-16 ; *Goldsmith, comptroller general, v. Macon & Augusta R.R. Co.*, 7-16.

18. — ; SUBSCRIPTION TO STOCK. A valid subscription for stock of an incorporated company is not rendered invalid by a change of name, effected by an act of the legislature. The company may sue for and recover by its new name ; *Bucksport & B. R.R. Co. v. Buck*, 7-318.

19. LIABILITY FOR OLD DEBTS. Where, for the purpose of convenience, a corporation changes its name, but continues in the same general business, with the same officers, the company under the new name is responsible for all the debts it had previously contracted ; *Dean v. LaMotte Lead Co.*, 8-138.

20. RIGHTS AND LIABILITIES. A mere change in the corporate name does not affect the rights or liabilities of a corporation. If under the legislative act by which the change is effected, these liabilities and rights are reserved, the reservation is no more than the affirmation of what the law would imply in the absence of the reservation ; *Trustees of University v. Moody*, 6-166.

21. CERTIFICATE OF CHANGE. In Illinois, a certificate of the change of name of a corporation is sufficient which shows a lawful meeting of the stockholders, at the office of the company, called

pursuant to statute, at which over two-thirds of the stock of the company was represented, and at which a resolution to change the name was unanimously adopted and stating the new name adopted; *Anthony et al. v. International Bank*, **6**-453.

22. **ESTOPPEL.** An appeal was prosecuted, to the supreme court (of Tennessee), in the name of a corporation, judgment debtor, by the name it bore at the time of suit brought. The corporation had, after suit brought and before judgment entered, consolidated with other companies under a new name. It moved in arrest of judgment, and its motion was overruled in the trial court. The motion was properly overruled. It was not competent to raise the matter by motion, and plaintiff in error was estopped to deny its existence in the appellate court; *E. Tenn. & Ga. R.R. Co. v. Evans*, **4**-186.

23. **MUST BE PLEADED.** A corporation defendant can not take advantage of a misnomer in arrest of judgment, but must plead it in abatement; *East Tenn. & Ga. R.R. Co. v. Evans*, **4**-186.

24. —. Misnomer of a party, if not pleaded, is waived. If it be necessary to plead a judgment obtained against one wrongly named, the party intended is to be connected with it by averment of his proper name; *Lehmann, Durr & Co. v. Warner*, **6**-155.

25. —. Action based on contract. If a corporation be joined as a party plaintiff, by its corporate name, the objection that, being a partnership, merely, the persons thereby represented should be specially named as parties can not be urged after plea to the merits filed and trial had; *French et al. v. Donohue*, **6**-489.

26. **PRACTICE AT LAW.** In an action brought against a corporation, a misnomer can be taken advantage of only by plea in abatement. Where service of process is properly had upon the proper officers, or officer, of the corporation sued and the case proceeds to judgment, no plea in abatement being interposed, the judgment will bind the corporation, though it be named by some other than its true name of incorporation; *Wilson & Co. v. Baker et al.*, **6**-563.

27. **MISNOMER.** The Fall River Print Works was summoned as trustee, in a process of foreign attachment. A claimant filed with his declaration an assignment duly recorded, of the wages of the principal defendant, from the Robeson Print Works, and offered evidence tending to show that the trustee was as well known by the appellation as by its corporate name, and that it accepted the assignment. The trial judge, jury having been waived, ruled there was no variance between the declaration and proof and found for claimant. It was held, there was no ground for exception; *Gifford v. Rockett et al.*, **7**-462.

28. **IMMATERIAL VARIANCE.** Complaint was filed in the name of the Capitol Bank of Topeka. The certificate of incorporation offered in evidence showed that the name selected by the corporation was The Capitol Bank, and that its stated place of business

was Topeka. The variance was immaterial; and, if amendment were necessary, the appellate court would consider it made; *Pape v. Capitol Bank*, 7-130.

29. AMENDMENT OF JUDGMENT AS TO. A judgment against a corporation can not be corrected nunc pro tunc, by striking out the name under which the defendant was sued and served with process and substituting another name; *Brown v. Terre Haute & Ind. R. R. Co.*, 8-270.

CORPORATE PROPERTY.

1. TRUST FUND. The stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right of priority of payment over any stockholder; *Bartlett v. Drew*, 4-634.

2. LEGISLATIVE CONTROL. A transfer of, may be well worked by legislative enactment, accepted, sanctioned and given effect to by the parties between whom the transfer is made; *Miller et al. v. Lancaster et al.*, 4-170.

3. —. The legislature may interfere with property held by a corporation for one public use and apply it to another. So it may delegate the power to do so by that other corporation. Such delegation of power must, however, be in express terms or must arise from necessary implication; *Application of City of Buffalo*, 8-480.

4. CREDITORS' LIEN; TRUST FUND. The property of every corporation is to be regarded as a trust fund for the payment of its debts. The creditors of the corporation have a lien thereon and may follow it in to the hands of the directors or stockholders. Where, therefore, the property of a corporation has been divided among its stockholders, a judgment creditor, after return of an execution against the corporation unsatisfied, may maintain an action, in the nature of a creditor's bill, against a stockholder, to reach whatever was so received by him; *Hastings, rec'r etc., v. Drew et al.*, 8-560.

5. INSTANCE. Certain of the directors and stockholders of the New Jersey Steam Navigation Company entered into an arrangement that a steamboat and an interest in another belonging to said corporation should be sold at auction, bid off by one of their number for their benefit, and that the other stockholders joining in the arrangement — those who did not participate — were to receive their proportionate share of the sum bid. The sale was accordingly made, in February, 1868, but the sum bid was not paid and the boat was, therefore, operated as before. In July, 1864, through the negligence of those in charge of the steamboat, a collision occurred between her and another vessel. In March, 1865, the steamboat was sold and, by an instrument executed in the name of said company by its president, transferred to another corporation. It was adjudged that the facts author-

ized a finding that the sale was not a real one; but that the title remained in said company, and that it was liable for the negligence. *Id.*

6. CREDITORS' LIEN. Creditors of a private corporation, who are secured by mortgage upon corporate property, acquire rights of which not even the legislature can deprive them; *Montgomery etc. R.R. Co. v. Branch et al.*, 6-436.

7. TENURE OF. A corporation is a distinct entity; in law, it is as distinct a being as an individual is; and is entitled to hold property — if not contrary to its charter — as absolutely as an individual can. Its estate, interest and possession are the same as in the case of a natural person. The right of stockholders to call their officers to account, and to prevent any malversation of the corporate funds or fraudulent disposition of their property, is in the exercise of its corporate rights and coincident with, but not adverse to, the corporate interests; *Graham v. R.R. Co.*, 6-81.

8. ——. The legal title to the property of a mining company is vested in the corporation, as such; not in its stockholders; *Wright v. Oroville etc. Mining Co.*, 3-146.

9. DIVIDENDS. Stockholders of a corporation have no claims to a dividend until it is declared. Until that time the earnings belong to the corporate body, precisely as any other property it may own; *Goodwin et al. v. Hardy et al.*, 3-350.

10. RIGHT TO CONTROL. An agricultural society is public as to its objects; but, being organized under general law not for pecuniary profit, it is essentially a private corporation. The public authorities can not, in any manner, control, or derive pecuniary benefit from the use of its property; *Thompson et al. v. Lambert et al.*, 6-523.

11. ITS ALIENATION. Corporate acts, by means of which corporate property is alienated, if not ultra vires, and when performed according to the mode prescribed by law are, in point of law, binding upon the corporation, and, through that title, equally binding upon the interest of stockholders; *Wright v. Oroville Gold etc. Mining Co. et al.*, 3-146.

12. ITS REDEMPTION. Where the property of a corporation has been sold under execution and no steps are taken by the officers of the association to redeem the property within the period limited by law, a stockholder may interpose to redeem such property for the corporation. By so doing he becomes the equitable assignee of the certificate of sale, and is subrogated to all the rights of the purchaser at the sheriff's sale. *Id.*

13. CONVEYANCE OF; SUBSEQUENT CREDITORS. If a corporation, being solvent and without actual intent to defraud creditors, shall dispose of lands for an inadequate consideration, or by a voluntary conveyance, its subsequent creditors can not question the transaction; *Graham v. R.R. Co.*, 6-81.

14. INSOLVENCY. When a corporation becomes insolvent it is

so far civilly dead that its property may be administered as a trust fund, for the benefit of its stockholders and creditors. *Id.*

15. **PURCHASE BY AGENT.** An agent of a corporation who, as an individual, purchases the property of a corporation for himself, as agent, can not uphold such purchase by proof that he agreed to pay what he thought the property to be worth; but, he is liable to the company to the amount of its actual value; *Nat. Bk. v. Drake*, 9-340.

16. **RECOVERY OF.** Stockholders of an existing corporation can not maintain an action in their individual names, for the alleged wrongful conversion of the corporate money or property; the right of action therefor is in the corporation; *Tomlinson et al. v. Bricklayers Union, No. 1 of Indiana*, 9-269.

17. **PREVENTION OF INJURY.** A stockholder has such an interest in the property of the corporation as will entitle him to prevent a sale thereof by persons who have no lawful power, or mandate, to sell; *State, ex rel., v. The Judge et al.*, 7-247.

18. **CONSTRUCTION OF WORDS.** Mortgage, by a corporation, of all the "real and personal property now or hereafter belonging to the company." A lien is created on the incomes, profit and earnings of the corporation, and mortgagees take such lien co-extensive with the lien on the property embraced in the deed, with a right to take and apply such incomes, etc., to the payment of the mortgage debt, so far as it is past due and unpaid; *Kelly et al. v. Trustees*, 6-130.

See **ASSETS; CORPORATE FUNDS; EQUITY; STOCK AND STOCK-HOLDERS.**

CORPORATE RECORDS.

1. **SPEAKING BY ITS RECORDS.** It is not true that a corporation can speak only by its record, either as to the creation or acknowledgment of liabilities upon contract; *M'Crary v. M'Farland*, 10-310.

2. **GENERAL RULE.** The members of a corporation have no right, upon speculative grounds, to demand an examination of the books of a corporation; *Pratt v. Meriden Cutlery Co.*, 3-163.

3. **WHERE KEPT; MANDAMUS.** The statute of Connecticut in regard to joint stock corporations requires that all books of account of such corporations shall be kept, and shall be open to the examination of stockholders, at the town within said state at which the corporation is located, or at the office of the treasurer thereof in said state. A manufacturing corporation organized under this statute had its factory and principal office in a town in said state, and also a store in the city of New York for the sale of its manufactured articles. The books pertaining to its business in manufacturing were kept at the place of its factory and principal office, while the books of account of sales and a bank account were kept in New York. A monthly statement from the books

kept in New York, showing the aggregate of sales, the amounts due to and the persons owing the company, was entered on the books in the principal office. Held, (a) that if it was the duty of the corporation to keep the books of original entry pertaining to its transaction in New York at its principal office in Connecticut, it would not be enforced by mandamus upon the application of a stockholder who fails to show any injury to himself from the keeping of the books in New York; (b) the business of the company in New York being lawful, the statute should not be so construed as to prohibit such business, by prohibiting the keeping of the necessary books in that city. *Id.*

4. INSPECTION OF BOOKS. A domestic corporation (of the state of New York) is within and controlled by the statute requiring the transfer books and the books containing the names of stockholders of any incorporated company to be open for inspection for thirty days previous to the election of directors; Sage et al. v. Lake Shore & M. S. Ry. Co., 8-500.

5. —. Such statute does not deprive the stockholders of the right to examine such books, for proper purposes and on proper occasions, at other times. Proceeding by mandamus is appropriate to enforce the right. *Id.*

6. STOCKHOLDERS' RIGHTS AS TO. A stockholder of a corporation has, in the very nature of things and upon principles of equity and fair dealing, the right to know how the affairs of the corporation are conducted — whether the capital, to which he has contributed — is being prudently and profitably employed, or otherwise. A provision of the charter of the corporation delegating to the board of directors the right to exercise "all the powers of the corporation," is not effectual to deprive a stockholder of his right, above stated, and to acquire the proper knowledge from an inspection of the corporate books and papers; State of Louisiana, ex rel. Martin, v. Bienville Oil Works Co., 7-197.

7. INSPECTION OF. The right to inspect the books and papers, within seasonable hours and in such manner as not to incommode the officers of the corporation, is in the stockholder; unless such right be extinguished by some law, clear and explicit in its terms, or by necessary and certain implication. *Id.*

8. —. Where a stockholder seeks to enforce his right to inspect the books and papers of a corporation of which he is a member, his application must not be general, but specific; that is to say, he must show a clear right and a just and useful purpose to be effected. *Id.*

9. —. An objection that if the relator has the right to inspect books and papers of the corporation of which he is a member, it is a right personal to himself, and one which can not be exercised by him through an agent, is without force. The right is useful only as it can be made available to the useful end intended; and, as the stockholder might be without special know-

ledge to an understanding of the books, etc., it would be to deprive him of his right, if he might not exercise it through one who has the necessary knowledge. *Id.*

10. **HOW WRITTEN.** It is not necessary that the minutes of proceedings of a corporation should be written up by the secretary of the company in his own handwriting, or that they should be approved by the board; *Wells et al. v. Rahway White Rubber Co.*, 3-592.

11. **BINDING FORCE OF ENTRIES.** A corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, if such third persons have not acted on, or seen, or known of, the existence of the matters so interpolated and appearing to be a part of the records; *Holden et al. v. Hoyt et al.*, 9-453.

12. **ITS EFFECT.** In order to exclude oral testimony of a contract, on the ground that a resolution found written of the book of record of a corporation is a subsisting written contract between parties, in a case where the immediate issue is whether there is, or was, a writing covering the contract, it must be first settled that there is such a written contract. Such resolution may not contain the assent of the parties, and will then be a simple declaration by the company, subject to be withdrawn or altered before acceptance; *Kalamazoo Novelty Manuf. Works v. Macalister*, 6-620.

13. **AS EVIDENCE.** A book containing a record of the regular proceedings had by the board of directors of a corporation, being a proper record book of that corporation in respect of such matters as are in contest, and actually kept by the proper officer of the company, is admissible to show a resolution adopted, and such resolution so proved is a declaration of the corporation admissible in evidence, although it may not be further shown that a majority of the board was present or that the minutes of the meeting were approved. *Id.*

14. —. Entries in the books of the corporation are, as a general rule, competent evidence of the proceedings of the corporation, and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of acts or resolutions entered on the minutes, so as to raise up, against them, an equitable estoppel arising from a consent to the proceedings; *Wetherbee v. Baker et al.*, 9-547.

15. —. The books of a corporation are admissible against the corporators, charged with liability on stock subscribed for, the fact that they are corporators having been otherwise established; *Macon & Augusta Ry. Co. v. Vason et al.*, 7-4.

16. —. The books of a corporation are competent evidence, for and against its members, in an action between the corporation and such members; *Washer v. Allensville etc. Co.*, 9-223.

17. **RECORDS.** As between a corporator and the corporation, the records of the corporation, or its stock book, so called, is the

evidence of their relations. Meetings of the stockholders, elections, dividends etc. are regulated by this record; *People v. Robinson*, 10-59.

18. VERIFIED COPY. If the books of a corporation are admissible in evidence, and are not within the jurisdiction of the court, copies, properly verified, are admissible; *Id. v. Pierce*, exec'r, 9-458.

19. STOCK BOOK AS EVIDENCE. Entries made in a book of the corporation, used for the purpose of keeping account of shares of stock issued, in the handwriting of the president, or of the company's secretary by direction of the president, are admissible evidence, in the hands of the president, to prove the issue of stock of said corporation; *Weber v. Fickey, jr.*, use of etc., 7-385.

20. IMPEACHMENT. Action for deceit in the sale of stock of a corporation. Defendant called, as a witness, the corporate treasurer, who produced his cash book and testified that he showed it to plaintiff before he purchased the stock from defendant. It is competent for plaintiff to cross examine as to the manner of keeping the books and to show that it was not fairly kept and did not contain a correct statement of the corporate affairs; *Teague v. Irwin*, 9-461.

21. ACCEPTANCE OF CHARTER. The journal of the acts and proceedings of a corporation is admissible in evidence, in an action against a stockholder, in an action to enforce his personal liability in favor of a corporate creditor, to show an acceptance of a charter amendment, without showing that the parties accepting such amendment were directors, if they be named as such in that journal; *Dows v. Naper*, 6-424.

22. LIABILITY TO CREDITOR. In such an action, on the part of a bank depositor against a stockholder, the bank ledger, although not a book of original entries, is testimony, as an admission of the corporation, on its own books, of a sum due to a depositor suing. *Id.*

23. RIGHT TO VOTE. The books and records of a corporation determine who are its stockholders, for the time being, and who have a right to vote on the stock, although the same may have been sold or pledged as collateral security. The person who appears, on the books of the company, to be the owner has the right to vote all the stock which stands in his name; *State etc. v. Ferris et al.*, 6-312.

24. —. The books of a corporation are prima facie evidence as to the person who possesses the right to vote at a meeting of the corporation; *Hoppin et al. v. Buffum et al.*, 4-151.

25. AS NOTICE TO DEALERS WITH. Persons dealing with a corporation are in no wise affected with notice of entries made upon its books of record and account, limiting the liability of holders of corporate stock; *Griswold v. Seligman*, 8-247.

26. **PRESUMPTION.** Where the records of a corporate body show that a resolution was adopted by the stockholders, it is presumed, in the absence of evidence to the contrary, that such resolution was lawfully adopted by the holders of a majority of the stock; *Star Line of Steamers v. Van Vleit*, **6-649**.

27. **PROOF OF ADOPTION OF RESOLUTIONS.** If it be shown that a resolution had been passed by a board of directors, lawfully assembled, it would be valid, although never entered on the company's minutes; *Wells et al. v. Rahway W. Rubber Co.*, **3-592**.

28. **CONTRADICTION THEREOF.** Parol testimony may be introduced, by a corporation, to evidence that a resolution of its board of trustees, spread upon the minutes of its proceedings, does not correctly express the proposition which was voted on and adopted by the board; *Gilson Quartz Mining Co. v. Gilson et al.*, **6-234**.

29. **ORAL TESTIMONY TO REBUT.** A resolution of directors of a corporation, appointing an officer, or employing an agent (in this case superintendent), which does not show assent of the appointee or employe, is not subject to the rule excluding oral testimony to affect a written contract. To the contrary, evidence may be given to show the actual establishment of contract relations under the resolutions; *Kalamazoo Novelty Manuf. Works v. Macalister*, **6-620**.

30. **DESTROYED.** When the records of a corporation are shown, to a reasonable certainty, to have been burned, parol evidence is admissible to show the organization of the corporation and action under it; *Proprietors of Bapt. Meeting House v. Webb et al.*, **7-282**.

31. **UNRECORDED RESOLUTION.** Parol testimony is admissible to prove a resolution or acts of corporate directors which, for reasons deemed sufficient by them, are not formally entered of record; *Bay View Homestead Association v. Williams et al.*, **6-224**.

32. **OMISSION TO RECORD.** The omission of the secretary to enter corporate resolutions upon the records of a corporation, whether by neglect or mistake, does not render the resolution of no avail. It may be proved by parol. *Id.*

33. —. Where a corporation, by its proper officers, formally assents to the expenditure of money, from its funds, but, by neglect or oversight of its secretary, no record entry is made of such assent, or if, for any cause, deemed sufficient by such officers, the corporation postpones the formal entry of such assent upon the record, the assent will bar the recovery of moneys paid thereunder. *Id.*

34. —. In the absence of the corporate seal to a written instrument, purporting to be executed by a corporation, or of the proof of facts and circumstances from which the existence of a resolution of authorization, or of the authority itself, may be inferred, the authority to execute a conveyance can only be established by resolution of the trustees recorded in a proper corporate

book, which should be in the custody of the secretary; *S. Cal. Colony Ass'n v. Bustamente et al.*, **6-239**.

35. SUFFICIENT INDICTMENT FOR FALSE ENTRY. Where the statute makes it criminal and penal on the part of an agent of a corporation to make a false entry in corporate books, an indictment, accusing such agent of that offense, should specify the particular entry, complained of and to be relied upon to secure conviction, setting forth or, at least, giving its substance according to its effect. An averment that defendant made a fraudulent entry in the books, by which false entry it appears that the cash on hand, at the commencement of business on that day, was a sum specified, is insufficient; *People v. Palmer*, **6-253**.

CORPORATE RESIDENCE.

1. EVIDENCE OF. That the meetings of the stockholders and directors are held, and the official records, cash book, stock ledger and certificate book are kept at an office and that the blanks used by the corporation have a printed heading giving the name of the corporation and the number of the street and the street of the city of such office, which is the place of business of its treasurer, is sufficient evidence that the corporation has a usual place of business there, albeit it does not hire such office; *First Nat. Bk. v. Hingham Manuf. Co.*, **7-496**.

2. IMPOSSIBLE. A corporation can not have two domicils, or residences, at the same time. It obtains a residence by authority of law, which fixes it; and it retains that residence so long as it legally exists within the state of its creation; *Newport & Cin. Bridge Co. v. Woolley*, **7-184**.

3. REMOVAL. Corporations can not remove from place to place, or establish branches for the transaction of their regular corporate business, unless authorized by law; *Chapman v. Colby Bros. & Co.*, **7-578**.

4. NON RESIDENCE. A corporation incorporated by and organized under an act of the legislature of a sister state, is a non resident entity; *Newp. etc. Bridge Co. v. Woolley*, **7-184**.

5. FOR SERVICE OF PROCESS IN EQUITY. If a corporation have a manufactory in one county and a usual place of business in another, a demand made in the latter county on an execution issuing on a judgment recovered against the corporation is a sufficient demand; *First Nat. Bk. v. Hingham Manuf. Co.*, **7-496**.

6. NON LOCATION AS BY CHARTER. Action to recover the amount of a subscription to stock. It is no defense that the corporation has not located its place of business as contemplated by its charter; *Courtright v. Deeds*, **5-366**.

7. ESTOPPEL TO DENY. One who has contracted with a corporation, by its corporate name, has admitted its corporate capacity at the time of the execution of the contract. In action brought on the contract the company need not state where it has its residence,

or principal place of business; *Nat. Ins. Co. v. Bowman et al.*, 8-141.

CORPORATE SEAL.

1. **USE OF.** The technical rule of the ancient common law that a corporation speaks and acts only by its common seal, if it ever obtained in this country, is now obsolete; *Trustees of University v. Moody*, 6-166.

2. —. The rule of the common law which prevailed at one time, in England, that a corporation has no capacity to act, or make a contract, except under its common seal, has been long since exploded in this country; *Crowley v. Genesee Mining Co.*, 6-260.

3. **EFFECT OF.** When the common seal of a corporation is affixed to an instrument in writing, purporting to be executed by it, and the signatures of the proper officers are proved, courts presume that the officers did not exceed their authority and the seal, itself, is *prima facie* evidence that it was affixed by proper authority; *Southern California Colony Ass'n v. Bustamente et al.*, 6-239.

4. **IMPRESSION MADE BY THIRD PERSON.** An impression of the seal of a corporation indented, without any intervening substance, upon the surface of a printed bond, otherwise valid as a corporate obligation, and purporting to bear the corporate seal by the corporation affixed, which was so impressed by the printer, by direction of the officers of the corporation, after the bond was printed, and in order to prepare it to be signed and issued, renders the bond valid as an obligation under seal; *Royal Bank of Liverpool v. Grand Junction R.R. & Depot Co.*, 1-644.

5. **SEALED NOTE.** Under statute of Minnesota, the seal of a corporation affixed to an instrument made by it, which is otherwise a negotiable note, does not impair its negotiability; *Auerbach et al. v. Mill Co.*, 8-6.

6. **ABSENCE OF.** In the absence of the corporate seal, to a written instrument purporting to be executed by the corporation, or of the proof of facts and circumstances from which the existence of a resolution of authorization, or of the authority itself, may be inferred, the authority to execute a conveyance can only be established by resolution of the trustees recorded in a proper book of the corporation; which should be in the custody of the secretary; *S. Cal. Col. Assoc. v. Bustamente et al.*, 6-239.

7. **PRESUMPTION AS TO.** A certified copy of a certificate of change of corporate name, showed, affixed to the name of the president thus: "(seal)." This affords *prima facie* evidence it is the seal of the corporation; it is not necessary the secretary of state, in making a certified copy, shall make a fac simile of the seal found upon the paper copied; *Anthony et al. v. International Bank*, 6-453.

8. **PRESUMPTION AS TO SEAL.** When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts will presume that the officers did not exceed their authority, and the presence of the seal is, per se, prima facie evidence that it was affixed by proper authority; *Morris v. Keil*, 5-487.

9. —. Where an appeal bond purports to have been executed in the name of a corporation, by its general attorney, and has the seal of the corporation attached, the presumption arises that the person using the seal had authority so to use it; *Indianapolis & St. Louis R.R. Co. v. Morganstern*, 9-152.

10. —. The seal of a corporation having been affixed to an instrument purporting to be executed by the corporation—in this case a mortgage—by the proper custodian thereof, the presumption is it was so affixed by the direction of the company, and it devolves upon those who dispute the validity of the deed to prove he acted without authority; *Evans v. Lee*, 8-338.

11. **PRIVATE SEAL.** If the by-laws require a transfer of stock to be under seal, a transfer signed, in blank, with the word "seal" inclosed in a bracket, is of no effect; *Bishop v. Globe Co.*, 9-468.

CORPORATE WRONG.

1. **JOINT INJURY; REMEDY.** The legal redress for a corporate wrong, which constitutes a joint injury to all the stockholders, should be at the instance of a corporation, which represents all stockholders for the purposes of legal remedy. A stockholder is not entitled to institute proceedings in his own name for the damage done to him individually, unless upon showing that the corporate authorities have refused to bring suit after proper application; *Talbot v. Scripps et al.*, 5-477.

CORPORATION.

1. **GRANT NECESSARY.** In the absence of a general statute on the subject of corporations and authorizing their organizations, etc., a private corporation can only be called into existence by special act of the legislature; *Douthitt et al. v. Stinson*, 8-178.

2. **POSSIBLE CONDITIONS.** A corporation takes its right to exist from legislative grant, either under the operation of general laws or special enactment. Corporations may exist either de facto or de jure; *Lehmann, Durr & Co. v. Warner*, 6-155.

3. **CREATION.** No particular words or expressions are necessary to create a corporation. If the legislative intention is manifested clearly to clothe an association of persons with rights and powers to be enjoyed and exercised by a collective name, for designated purposes, and in a corporate capacity, the association is by implication a corporation; *Grangers Life & Health Ins. Co. v. Kamper*, 10-21.

4. **CAN NOT CREATE CORPORATIONS.** Corporations created under

the general law of the state have no power to create a corporation distinct and independent from themselves. The word persons found in the law was designed to mean natural persons, not judicial persons. Human beings capable of contracting alone can create a corporation; *Factors & Traders Ins. Co. v. New Harbor Co.*, **10-514**.

5. **CAN NOT BE EMPLOYE OF ANOTHER.** Under a statute making the stockholders of a corporation individually liable for the debts of corporation to its employes, another corporation performing work for such corporation can not be said to be an employe in the sense of creating an individual liability against the stockholders; *Dukes v. Love*, **10-327**.

6. **DISTINGUISHED FROM NATURAL PERSON.** The distinction between a natural person and a corporation is that while the former may make any contract not prohibited by law or against public policy, the latter can exercise no powers not expressly conferred by its charter; *Matthews v. Skinker*, **8-149**.

7. **NATURE OF.** Corporations are artificial beings—existing entities—distinct and separate from the various shareholders. The one is the aggregate whole; the other the constituent parts, or memberships, so far as pecuniary values are implied; *Board of Revenue of Montgomery County v. Montgomery Gas Light Co.*, **6-175**.

8. **DESCRIBED.** Private corporations, created for business purposes, are artificial beings, clothed with certain rights and privileges, and are permitted to own and acquire property, for certain purposes and to a limited extent; and, when so created, they are subject to the same legislative control that natural persons are, under like circumstances; *Ward, rec'r. v. Farwell et al.*, **6-490**.

9. **CHARACTER OF.** A private corporation, chartered to transact business, is a trustee of its capital, property and effects; (1) for the payment of its creditors; and, (2) for the benefit of its stockholders; *Montgomery & West Point R.R. Co. v. Branch Sons & Co.*, **6-136**.

10. **WHAT IS A PRIVATE CORPORATION.** Where the object of the creation of a corporation is not declared in the law creating it, but it appears that it was to advance the private interests of landowners in the district incorporated, and none others are embraced in its provisions, although it may incidentally enhance the general prosperity of the whole community, it is none the less a private corporation; *Board of Directors for Leveeing Wabash River v. Houston*, **5-268**.

11. **CLASSIFICATION OF CORPORATIONS.** There are several classes of corporations: 1. Municipal, the object of which is to promote the public interest; 2. Private, the object of which is to promote private interests; 3. Quasi public, which are technically private, but have in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify con-

ferring upon them important governmental powers, such as the exercise of the right of eminent domain; *Miners Ditch Co. v. Zellerbach*, 1-250.

12. CLASSIFICATION OF CORPORATIONS. Private corporations derive from the government the right to exist, and exercise powers granted. In all other respects, and to the extent of their granted powers, they stand upon the same footing as natural persons. *Id.*

13. DIFFERENT CLASSES OF RIGHTS. There are three classes of rights with reference to corporations: 1. Those which pertain to the corporation as such; 2. The individual rights of stockholders as such; 3. The rights of creditors of the corporation. *Id.*

14. ENGLISH JOINT STOCK COMPANIES. An association organized in England under a deed of settlement legalized and enlarged by acts of parliament, and possessing the following characteristics and powers: 1. A distinctive and artificial name, by which it can make contracts; 2. A statutory authority to sue, and be sued, in the name of its officers as the representatives of the whole body; 3. Perpetual succession by the transfer and transmission of the shares of its capital stock, when new members are introduced in place of those who die or sell out; 4. An existence as an entity apart from the shareholders, which enables it to sue its stockholders and be sued by them, is in contemplation of the law of this country a corporation, and will be so held, notwithstanding acts of parliament, in accordance with a local policy, declare that it shall not be so held; *Liverpool Ins. Co. v. Comm. of Mass.*, 1-60.

15. EXTRA-TERRITORIAL POWERS. A corporation can have no legal existence, except in the state of its creation. So, where a corporation organized in one state, procured in a neighboring state an act permitting the organization of a branch in the latter state, held, it was in effect the organization of a district corporation, having the same name, but a separate legal entity, and in its operations confined to the sovereignty from which it emanated; *Grangers Life & Health Ins. Co. v. Kamper*, 10-21.

16. DOING BUSINESS IN ANOTHER STATE. Although it is settled law that a corporation can not migrate to another state, yet it may do business in a state other than that of its creation, where its charter allows, and local laws do not forbid, and in the absence of any prohibition by local laws, it may bring suits in such other state; *Lycoming Fire Ins. Co. v. Langley*, 10-542.

17. MAY EXERCISE POWERS AT ANOTHER PLACE. It does not follow that because a location of the academy is fixed at a particular place by the charter the powers of the corporation must be exercised at that place, and no other corporate purpose than that of furnishing education may be carried on at the place where the academy is established. The incidental powers which are necessary for the maintaining of an academy may be exercised elsewhere; *Santa Clara Academy v. Sullivan*, 10-298.

18. ATTEMPT TO INCORPORATE. Where an attempt has been

made by a corporation to create such a corporation and property has been acquired in the name of the concern, the parties in interest being unwilling to own it in indivision can have it sold and the proceeds divided pro rata; *Factors etc. Ins. Co. v. N. Harbor Co.*, 10-514.

19. **FAILURE TO COMPLY WITH STATUTE.** Where the statute so requires, the failure of a banking corporation organized under the statute, to pay up its entire capital stock in cash, within one year from its organization, will render its charter liable to forfeiture; *People v. City Bank of Leadville*, 10-90.

20. **REQUISITES TO VALIDITY.** One of the precedent conditions to the validity of the act of a corporation purporting to act under the statute, is a notice stating the name, amount of stock, etc., published as the law requires; *Heinig v. Adams & Westlake Co.*, 10-448.

21. **POWERS.** A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operations in other states, so long as it does not depart from the terms of its charter; *A. T. & S. F. R.R. Co. v. Fletcher*, 10-432.

22. —; **AUXILIARY.** The legislature creating the corporation may confer upon it additional powers, auxiliary to the original design or purpose of the corporation. *Id.*

23. —; **RESTRAINING EXERCISE OF ILLEGAL POWERS.** If a corporation assumes to exercise powers by virtue of an invalid ordinance of a municipal corporation, or in excess of authority legally conferred upon it, a court of equity has power to restrain it by injunction; *Atty. Gen. v. Chicago & Evanston R.R. Co.*, 10-246.

24. **GENERAL RULE OF MANAGEMENT.** In the government of corporations, much must be left to the judgment and discretion of the directory. And much must be credited to the fallibility of human judgment; *Merchants & Planters Line v. Waganer*, 10-12.

25. —. In the government of corporations much must be left to the discretion of the directory; *Merch. etc. Line v. Waganer*, 10-12.

26. **MISMANAGEMENT; SUIT BY MINORITY.** A bill filed by a minority of the stockholders seeking to hold the majority and the directors accountable for mismanagement of the corporate trusts, charging them with acts of wrong doing, none of which are ultra vires, which contains no averment that the corporate effects are imperiled by the insolvency of the parties, or that any request had been made soliciting the use of the corporate name in bringing suit against the offenders, or any attempt to obtain redress through the managing board, or a meeting of the stockholders as a body to secure redress for the alleged grievances, is without equity. *Id.*

27. **CONTRACTING DEBTS.** Where a corporation by its articles provided that the highest limit of liability of the corporation should in no case exceed \$15,000, and the capital stock should be \$40,000, held, as between the corporation and a creditor, the latter could compel the payment of the entire stock if necessary to satisfy his demand; *Haldeman v. Ainslee*, **10-454**.

28. —. If a member of the corporation, of necessity knowing the purpose of the articles of incorporation, contracts debts beyond the limit, without the consent of the stockholders, and pays such debts, he can not recover such debts beyond the limit fixed in the articles. *Id.*

29. **GUARANTEE OF BONDS BY.** Where a corporation guarantees a bond, takes it as its own and sells it, its guarantee is binding upon the company in the hands of an innocent holder without notice of the origin of its title, notwithstanding the guarantee when made may have been *ultra vires*; *A. T. S. F. R.R. Co. v. Fletcher*, **10-432**.

30. **LOANING MONEY.** There is nothing in the character of a corporation for the loaning of money contrary to public policy in this state. Where a party has borrowed money of such corporation, to allow the plea of *ultra vires*, would work a wrong and injustice which is not admissible; *Brown v. Scottish Am. Mtg. Co.*, **10-233**.

31. **POWER TO PURCHASE REAL ESTATE.** Every corporation is presumed to have the power to purchase and hold real estate. If there is any thing in its charter abridging this power, it should be shown affirmatively; *People v. La Rue*, **10-83**; *Alexander v. Tolleston Club*, **10-215**.

32. **DEED BY; APPLICATION OF PURCHASE MONEY.** Where a railroad corporation was authorized by a statute to sell lands, the proceeds to be applied to payment of certain mortgage bonds, a sale of such lands in payment of the ordinary debts of the company, is in contravention of the statute, and void; *Standifer v. Swann & Billups*, **10-49**.

33. **DISPOSAL OF ASSETS.** Under the laws of Louisiana a corporation has no right to make a voluntary cession of its assets; *In re Louisiana Savings Bank*, **10-466**.

34. **MAY PREFER A CREDITOR.** A corporation, like an individual, may devote a part of its property to the payment of its debts, and in so doing, may prefer one creditor to another, if this is done in good faith, and not for a fraudulent purpose; *Reichwald v. Commercial Hotel Co.*, **10-203**.

35. **MERGER.** Where a corporation transfers all its assets to another corporation, which thereupon assumes all the liabilities of the former, and sufficient assets are received to pay such liabilities, the latter corporation is liable to a creditor of the former for the amount of his claim; *Mitchell v. Beckman*, **10-55**.

36. **PERSONAL LIABILITY.** In this country the individual lia-

bility of the shareholders for the debts of the association is not incompatible with the corporate idea; *Liverpool Ins. Co. v. Mass.*, **1-60**.

37. CREDITORS' CLAIMS. Creditors of a private corporation who are secured by mortgage on corporate property, acquire rights which even the legislature can not divest; *Montgomery etc. Co. v. Branch et al.*, **6-136**.

38. LIABILITY OF. While a private corporation continues in life and operation, according to the design of its charter, its general creditors have no specific lien, to entitle them to sue it in a court of equity. During such time its property and effects are liable to the payment of its debts and, if these be not voluntarily paid, such property may be subjected to the payment by action at law. If the debts be left unpaid and its property distributed, or transferred for the benefit of third persons, taking not as bona fide purchasers without notice, or if it be dissolved, or disorganized, equity will pursue the property for the benefit of creditors. *Id.*

39. EXISTENCE NOT QUESTIONED COLLATERALLY. In an action by a corporation against a subscriber of stock for instalments upon his subscription, the subscriber can not, in a collateral way, question the existence of the corporation, or the regularity of its organization; *M'Cune Mining Co. v. Adams*, **10-430**.

40. REGULARITY NOT QUESTIONED. Under a bill filed for such a purpose, no inquiry can be made as to irregularities in the organization of the corporation; *Merch., etc., Line v. Waganer*, **10-12**.

41. INJUNCTION AGAINST. Where a corporation has ceased to exist and is absolutely dead in law, a court of equity has jurisdiction to enjoin threatened acts by persons assuming to act on behalf and in the name of the corporation; *Atty. Gen. v. Chicago & Evanston R.R. Co.*, **10-246**.

42. CONTROL OF STREETS. Municipal corporations may have control of streets for certain purposes, but unless it is specially granted, they can not, as against a private corporation having a charter from the same legislative powers, with permission to lay gas mains in the streets, prohibit the laying of such mains, there being no condition in the charter of the latter requiring it to obtain permission from the municipality; *City of Atlanta v. Gate City Gas Light Co.*, **10-150**.

CORPORATION DE FACTO.

1. ABORTIVE ATTEMPT TO ORGANIZE. Where persons had made an attempt to organize a corporation under the general incorporation law; have selected a corporate name, appointed trustees, effected an organization by electing a president and other officers, and where the trustees so appointed have acted for years in the general management of the property of the association, leasing,

mortgaging and expending a large amount of money upon it, there is a corporation de facto. The regularity of its organization can not be questioned collaterally. Any alleged non compliance with the law can only be inquired into by a writ of quo warranto or scire facias; *Thompson v. Candor*, 4-355.

2. HOW CONSTITUTED; ESTOPPEL. Where there is a general law under which an incorporation can be had; an incorporation attempted in good faith to be had thereunder, by the requisite number of incorporators; and, where, in reliance upon such perfect compliance with the statute, in all the steps prescribed for the organization, there is an actual, open, and notorious exercise, for a series of years, unchallenged by the state, of the powers of a corporation, public policy will not permit one who has frequently dealt with it as a corporation, when sued upon a note purchased and held by such supposed corporation, and which, as a corporation, it might rightfully purchase and hold, to defeat an action by showing a technical omission in some of the proceedings prescribed for the organization of corporations. The corporation is, as to him, one de facto. Whether it be one, also, de jure, is a question not open for inquiry in that collateral manner; *Pape v. Capitol Bk. of Topeka*, 7-130.

3. —. Where persons have subscribed and filed articles of association, under a general statute, for the organization of corporations and there has been long user of the franchise of being a corporation, and dealings, large in amount and extensive in respect of the number and variety of transactions, one who has — for a series of years — dealt with the concern as a corporation and, in the particular transaction in controversy, has acknowledged the corporate existence, will not be allowed, collaterally, to attack the validity of the corporate entity, that he may charge individual members of the company with the precise obligation which was unequivocally accepted as a corporate liability; *Merch. & Manuf. Bk. v. Stone et al.*, 6-609.

4. WHEN IT EXISTS. There was a general statute in existence authorizing the formation of railroad corporations. Under its provisions articles of association were prepared and filed with the secretary of state, who issued the certificate prescribed by the law. It being further proved that there had been a user of the franchises purporting to be invested in the association, the company became a de facto corporation, and neither the eligibility of the directors nor the rightfulness of the existence of the corporation could be inquired into collaterally; *Cin., La Fay. & Chic. R.R. Co. v. Danville & V. R.R. Co.*, 5-326.

5. DIRECTORS OF. It being shown that the directors of a de facto corporation were elected under color of authority, and were acting as such, it was held, they were de facto officers of the corporation, and their title to the office could not be brought in question and decided collaterally. *Id.*

6. **HOW ESTABLISHED.** To establish a corporation de facto it is necessary to show the existence of a charter, or some law, by which the assumed powers are claimed to be conferred and the user, of the franchise claimed, under such charter or law; *Abbott v. Omaha Smelting and Refining Co.*, 8-305.

7. **ILLUSTRATION.** An association may be regarded as a de facto corporation where there is a law authorizing the creation of a corporation of its class and powers and where there is an attempt, in good faith, to comply with the law and the only error is in filing a certified copy of the articles of association, instead of a duplicate, with one of two designated depositaries, and where there is, also, an exercise of corporate functions; *Williamson v. Kokomo Building & L. F. Assoc.*, 9-301; *Hudson v. Green Hill Sem.*, 10-259.

8. —. There being an association of persons, who elect officers and proceed with the duties of the organization — as the erection of a church — this constitutes a corporation de facto and proves user. The attempt to organize, having been, at first, abortive, a subsequent formal certificate referring to the original organization, relates back and cures the original defect; *Willard v. Trustees etc.*, 4-370.

9. **PER CONTRA.** If the acts and proceedings of a company, or association, consist only of such acts and proceedings as might be performed without an incorporating act, or corporate grant or franchise, a corporation can not be inferred from such acts; *Abbott v. Oma. S. & Ref. Co.*, 8-305.

10. **WHEN EXISTENT; ESTOPPEL TO DENY.** Where the evidence shows a substantial compliance with a general incorporation law, but, also, the omission of some act not a prerequisite of corporate existence and action, with acts of user, in accordance with articles of association, in a collateral proceeding, the company will be deemed to be a corporation de facto, vested with the power and right to exercise the acts contemplated in its franchise; and, so far as regards the relation between such company and one who has contracted with it as a corporation, the latter will be estopped to deny its existence as a de facto corporation; *Humphreys, impleaded etc., v. Mooney*, 6-292.

11. **RE-INCORPORATION.** Where persons endeavor to incorporate under a general law but, by mistake, the purpose is not effected and, upon ascertaining the defect, re-organize formally and lawfully, but with a new name, the creditors of the old company are not barred from prosecuting their claims against the old but defective corporation and may follow it into the new organization; *Empire Manuf. Co. v. Stuart*, 7-577.

12. **NOT SUBJECT TO COLLATERAL ATTACK.** Where the acts done by persons assuming to act as a corporation are such as to constitute a de facto corporation, a collateral attack by a private person

will, as a general rule, be unavailing; *Hudson v. Green Hill Seminary*, 10-259.

13. **POWERS.** A corporation de facto may do and perform every act and thing that the same entity could do were it a de jure corporation, and its acts are binding as to the whole world, except in a direct proceeding to arrest its usurpation of power; *People v. La Rue*, 10-83.

14. **LIABILITY OF.** A company of persons who may incorporate under a general law and who have attempted to organize in good faith under such law, having given negotiable paper in the corporate name assumed, can not repudiate the transaction or evade responsibility, by setting up its own mistake; *Empire Manuf. Co. v. Stuart*, 7-577.

15. **ITS RELATIONS TO A CO-PARTNERSHIP.** A corporation existing de facto only; it does not follow, as a matter of law, that the members thereof are liable as members of a co-partnership. This, too, is so even if the legal existence of the corporation could be attacked and overthrown collaterally, or otherwise. This will, in all cases, depend upon the facts of each particular case; *Humphries v. Mooney*, 6-292.

16. **WHETHER BOUND AS PARTNERS.** If a party deals with a company as a corporation, both parties believing it to be such, and with no intention at the time of giving credit to or binding the members of the company individually or as partners, they can not be held as partners on that contract; *Planters & Miners Bank v. Padgett*, 10-145.

17. —. A corporation and partners are distinct, and though the corporation is of the same name as the partnership, and did business by the same agent before incorporation, it is not liable for a debt due by the partnership. *Id.*

18. —. An abortive attempt to organize a corporation does not of necessity constitute the members of the body partners or a joint stock company; *Blanchard et al. v. Kaull et al.*, 4-289.

19. **EQUITY JURISDICTION.** When a corporation exists de facto, the court of chancery can not, at the instance of private parties, restrain its operations upon the ground that its organization is not de jure. In such case the appropriate remedy is by quo warranto, or information in the nature thereof, instituted by the attorney general, representing the state; *National Docks Ry. Co. et al. v. Cent. R.R. Co.*, 8-420.

CORPORATION, FOREIGN; see **FOREIGN CORPORATION.**

CORPORATION TO CONSTRUCT AND REPAIR WATER CRAFT.

1. **ULTRA VIRES — TO DO FORWARDING BUSINESS.** An incorporation act authorizing associations for building and repairing steamboats and other water craft and carrying on business usually con-

nected with the main objects of the corporation, does not confer the right to purchase, own and use a wharf boat for receiving, storing, forwarding or delivering merchandise or freight, or to carry on the business of receiving freight, etc., from steamboats or shippers, or of storing, forwarding or delivering the same; *Ohio, ex rel., v. Southwestern Transportation etc. Co.*, 4-59.

CORPORATORS.

1. NOT NECESSARILY STOCKHOLDERS. Corporators, under the Pennsylvania act of 1863, need not necessarily be subscribers to stock. They need have no interest in the company to be formed. They are mere instruments of the law for the purpose of preliminary organization. When that is accomplished, the amount required as capital paid in, the necessary certificate signed and the charter granted, they are *functi officio*. The corporation is thenceforth composed of the stockholders; *Densmore Oil Co. v. Densmore et al.*, 4-106.

2. SUIT TO ESTABLISH RIGHTS. A corporator whose membership is denied, has a right to have it established. He may maintain an action to vindicate his right; *Tipton Fire Co v. Barnheisel*, 10-307.

3. MAY DEAL WITH CORPORATION. A corporator is not chargeable with constructive notice of acts of the corporation, and may deal with it as a stranger may, if his personal connection with the corporation is not such as to notify him of reasons to the contrary; *Rice v. Peninsular Club*, 10-621.

COUNTY.

1. CHARACTER OF ORGANIZATION. Counties are involuntary political organizations, created by general statute, to aid in the administration of the government. The statute confers upon them all the power they possess, prescribes all the duties which they owe, and imposes all the liabilities to which they are subject. They have a corporate existence different from that of private corporations and municipal corporations proper, such as cities acting under general or special charters—the latter always having more extended powers and corresponding liabilities; *Soper v. Henry County*, 2-304.

2. LIABILITY AS TO HIGHWAYS. Counties and other quasi corporations are not liable to private actions for the neglect of their officers in respect to highways, unless the statute has expressly declared the liability. *Id.*

3. LIABILITY AS TO BRIDGES. A county is liable for injuries resulting from the unsafe condition of county bridges proper; that is, bridges built by the county authorities in the exercise of their statutory power and duty "to make and repair bridges;" but the county is not liable for the omission of road district officers to

keep in repair roads and bridges which the law commits to the control and jurisdiction of the road district. *Id.*

4. **LIABILITY AS TO BRIDGES ; RULE APPLIED.** When a bridge or culvert twelve or fourteen feet wide and two feet across, constructed over a ditch or small ravine about two feet in depth, was out of repair in such manner as to cause an injury to plaintiff while he was traveling over the same, it was held, that the county was not liable. *Id.*

5. **TOWNSHIP ORGANIZATION.** The statute of the state of Illinois, authorizing the township system of organizing counties, requires the commissioners charged with the duty of perfecting the organization to divide the county into as many towns as there are townships, according to the government surveys. To this requirement several exceptions are attached. It is not essential to the validity of a division disregarding the boundaries of townships by government surveys, that the report should show the facts which authorized a disregard of such boundary lines ; *People v. Gaines et al.*, 2-154.

6. — ; **COUNTY COURT.** In counties of the state of Illinois, which have adopted the township system of organization, there is a June term of the county court, legally constituted for county business, to be held on the first Monday of the month ; *Parks et al. v. Miller, treas.*, 2-185.

7. — ; **JURISDICTION ; TAXES.** Such court can enter judgment for taxes without the presence of the justices of the peace, and without notice to them. *Id.*

8. — ; **NOTICE.** To give the court jurisdiction to render judgment, it is not necessary that the collector's notice of application for judgment should specify the first day of the term of court to which application is made. *Id.*

9. **WARRANTS DRAWN WITHOUT AUTHORITY.** The county court of Arkansas has the power "to audit, settle and direct the payment of all demands against the county," and it is made the duty of the treasurer to disburse the moneys of the county "on warrants drawn by order of the county court." It also provides "that when any county court shall ascertain that any sum of money is due from the county to any person, body politic or corporate, an order shall be made allowing the same, and directing the clerk to issue a warrant therefor." It was held, that a warrant drawn by the clerk, without an order of the county court, was void in the hands of a third person, who received it without actual notice ; *Parcel v. Barnes & Brother*, 2-39.

CREDITOR ; see **DEBTOR AND CREDITOR.**

CREDITOR'S BILL.

1. **LIEN OF CREDITORS.** The stock and property of every corporation is to be regarded as a trust fund, for the payment of its

debts. Its creditors have a lien and the right of priority over any stockholder; *Bartlett v. Drew*, 4-634.

2. LIEN OF CREDITORS. Creditors of a corporation have a lien upon the property of the corporation and may follow it into the hands of directors or stockholders; *Hastings etc. v. Drew et al.*, 8-560.

3. REMEDY. The remedy of a creditor who complains of the fraudulent misappropriation of corporate funds, whereby the company becomes insolvent and he is damnified, is by a proceeding in the nature of a creditor's bill; *Reed v. Goldstein*, 6-247.

4. MAY REACH PROCEEDS OF DONATION TO CORPORATION. Where a private corporation was organized to build dams across the Illinois and Fox rivers, for manufacturing purposes, and the city of Ottawa made a donation of \$60,000 in its bonds, to be applied in building such dams, delivering the same to one of the corporators, on his personal obligation to make the improvement or return the bonds or their value, and he turned the same over to the company, which was to indemnify him against his liability to the city, and such bonds were used as intended, and the dams completed so as to relieve the corporator from his personal obligation to the city, and the company then issued stock to several subscribers in respect of such donation, for which they paid nothing, some of which stock they sold and converted into money, it was held, that the money and stock so received by the subscribers could be reached in equity, by a creditor's bill, and applied to the payment of debts incurred by the corporation in erecting the dams; *Hickling et al. v. Wilson et al.*, 9-177.

5. PARTY TO. In a proceeding, in the nature of a creditor's bill, the corporation is an essential party; *Reed v. Goldstein et al.*, 6-247.

6. ADJUSTING EQUITIES. On bill filed by a creditor of an insolvent corporation, after return of execution unsatisfied, to subject property taken by a former stockholder of the company in exchange for his stock, which property, before its exchange, was a trust fund for creditors, a decree finding the property of the company so withdrawn, and in the hands of the stockholder, liable for the whole debt was approved. The creditor, in such case, is not bound to see to the adjusting of equities among stockholders; *Clapp et al., ex'rs, v. Peterson*, 9-172.

7. WHEN BILL LIE, VEL NON. An action, in the nature of a creditor's bill, can not be maintained by a creditor of an extinct corporation, to reach funds of the corporation paid out to stockholders before dissolution, without a valid judgment, and execution against the corporation, or its successors, or without first exhausting the creditor's remedies against the property remaining in the hands of the corporation, or received by its trustees on its dissolution; *Sturges, admr., v. Vanderbilt, impl.*, 8-523.

8. AGAINST STOCKHOLDERS; PRACTICE. In a proceeding, by a

creditor's bill, against the stockholders of an incorporated company, the failure to make the company a party defendant, when the bill does not allege that the company has been dissolved, or is without assets, is an irregularity ; *Perkins v. Sanders et al.*, 8-53.

9. AGAINST CORPORATION AND STOCKHOLDERS. In a proceeding by judgment creditors of an insolvent corporation, for the purpose of compelling stockholders to pay the amounts due on their subscriptions to the capital stock and to have the same appropriated to the judgments of such creditors, all the solvent stockholders of the corporation within the jurisdiction of the court must be joined as defendants, except where they are so many as to justify the allegation that they are too numerous to be all made parties ; *Vick et al. v. Lane, Hazlehurst & Co.*, 8-51.

10. PARTIES. Neither the bond nor stock holders of a corporation are necessary parties to a creditor's bill seeking to subject assets to the payment of debts, where they are represented by the parties before the court ; *Chicago, R. I. & P. R.R. Co. v. Howard et al.*, 1-1.

11. DECREE ; CASE IN JUDGMENT. Two judgment creditors of an insolvent corporation filed a bill in chancery, for themselves and all other creditors who might come in, against the corporation and three of its stockholders, alleging the insolvency of the corporation, praying for an account of the balance of subscription, due by the defendant stockholders and for the appropriation of the same to the satisfaction of the judgments of complainants and others who might come into the case. The bill alleged that all the solvent stockholders of the corporation were made defendants ; but, the answer disclosed the fact that some had been omitted. The bill was dismissed as to one of the complainants and, without any other changes in the pleadings, the court rendered a decree in personam and in solido against the three defendant stockholders. Held, on appeal, that the decree was erroneous. *Id.*

12. DECREE AGAINST STOCKHOLDERS OF INSOLVENT CORPORATION. Where a creditor of an insolvent private corporation has exhausted his remedy at law against the company for labor and materials, he will be entitled, in equity, to be subrogated to its rights against its debtors, as subscribers for unpaid subscriptions ; and, in such cases, it is no error to find the amount due the company from a subscriber, and award an execution against him for the amount so found. It is not necessary to make an apportionment of the pro rata share of each subscriber necessary to discharge the company's indebtedness to such creditor. The creditor stands in the same position as would the company if suing for the subscriptions ; *Hickling et al. v. Wilson et al.*, 9-177.

13. EVIDENCE. In an action against a corporation, in the nature of a creditor's bill, the judgment against the corporation is, at least, prima facie evidence of the liability of the company ; *Hastings, rec'r, v. Drew et al.*, 8-560.

CRIMINAL LAW.

1. EVIDENCE OF CORPORATE EXISTENCE. On the trial of a criminal cause, the existence of a corporation may be proved by general reputation. A *de facto* existence is all that is necessary to be shown; *State of Kansas v. Thompson*, 7-159.

2. PROVING CORPORATE EXISTENCE. It is competent, on the trial of an indictment, to prove that a corporation, averred to be the injured party, existed by testimony that it was known and acting as a corporation; *Norton v. State*, 7-109.

3. —. It is doubtful whether, on the trial of an indictment, averring a corporation to be the party immediately injured, it is incumbent on the state to do more than prove there was an artificial being assuming and acting under a name indicating and implying a corporation. *Id.*

4. —. On trial of an indictment against an agent of a corporation — in this case an express company — the incorporation of the company may be shown by parol; *State of Missouri v. Cheek*, 8-185.

5. BURGLARY; INDICTMENT. When a corporation is referred to in a pleading by a name such as is usual in creating corporations and which discloses no individuals, a corporate existence is implied, without being specially averred; *Norton v. State*, 7-109.

6. FORGERY. An indictment charged a forgery to have been committed by forging the signature of a person on the back of a draft, with intent to defraud such person. It was unnecessary to allege that the bank, upon which the draft was drawn, was incorporated; *State of Nevada v. M'Kiernan*, 9-540.

7. EVIDENCE OF CORPORATE EXISTENCE. In a prosecution for malicious injury done to corporate property — in this case injuring a toll gate of a turnpike corporation — it is not necessary for the state to prove the organization of such company; it is sufficient to show that it was known and recognized as a corporation and was operating as such; *Franklin v. State of Indiana*, 9-257.

8. ELECTION OF TRUSTEES. Indictment for trespass upon the realty of a corporation. It is competent to prove the election of trustees by parol testimony. It is so, at least, in the absence of some statutory provision to the effect that such election can only be proved by written evidence; *White v. State*, 7-101.

9. ACTING TRUSTEES. When acting trustees are named in an indictment, as the owners of property, through which they are injured, as a corporate body, their names and trusteeship is provable by parol. *Id.*

10. PRESUMPTION. Indictment for trespass on realty. As between a corporation and the person accused, and all others excepting the state, it may well be presumed, after the lapse of twenty-four years of assumed corporate existence, that the party injured, named as a corporation, is such. Certainly, a want of

legal corporate organization can not, in such case, be shown collaterally or as a defense. *Id.*

11. **TRESPASS.** In such a case it is not necessary that the state shall prove the organization of the company. It is sufficient to show that it was known, recognized and operated as a corporation; *Franklin v. State*, 9-257.

12. **EMBEZZLEMENT BY AGENT.** Prosecution of an agent of a foreign insurance company, for the embezzlement of its moneys, received by him in the course of his agency. He can not defend by proof that he, as agent, has not complied with a statutory requirement that, as such agent, he shall procure and file the auditor's certificate showing that he is entitled to carry on the insurance business of the company in this county and had, therefore, received the moneys, for the company, upon an illegal consideration and in the prosecution of an unlawful business; *State v. Tinney*, 9-234.

CURATIVE STATUTE; see **CONSTITUTIONAL LAW**.

CUSTOM.

1. **OF CORPORATION, WHEN NOT BINDING.** A corporation can not relieve itself from responsibility for neglect or failure to perform its duty by pursuing a practice at variance with its agreement, as created by articles of incorporation, without the consent of all the stockholders. Any stockholder not assenting thereto, will not be bound by any custom which the officers of the corporation may adopt in contravention of its agreement to protect the rights of the several stockholders; *O'Connor v. North Truckie Ditch Co.*, 9-542.

See **CHURCH ORGANIZATION**; **EXPRESS CO.**; **USAGE**.

D.

DAMAGES.

1. **LIABILITY OF CITY FOR CONSEQUENTIAL DAMAGES.** An incorporated city is not ordinarily liable for consequential injuries to private property resulting from the grading and improvement of its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care required relates to the plan as well as to the execution of the work; *City of Indianapolis v. Huffer*, 2-227.

2. **MEASURE OF.** In an action against a city to recover damages resulting from the overflow by water, several times, of plaintiff's lot and dwelling thereon, used by him as a residence for his family, such overflows being caused by an insufficient and carelessly constructed sewer, built by the city, the jury made up the amount of damages by ascertaining the losses suffered by the

plaintiff by reason of injury to his realty, garden crops and personal property, such as household goods and family supplies, and adding thereto a certain sum on account of decrease in the rental value of the premises during the period caused by the backwater; held, that the damages were excessive. *Id.*

3. **TRANSFER OF STOCK.** Action by a corporation, against one to whom it has issued a new certificate of stock on the faith of a forged power of attorney, to transfer stock presented by him. The measure of damages will embrace, (1) costs and expenses — not including counsel fees — of a suit brought against the company, by the person whose name was forged, to compel the issue of new stock to replace that transferred; the corporation having notified defendant and requested him to defend the suit, which he refused to do; (2) the amount paid, bona fide, by the corporation for stock bought by it, to replace that so transferred, though such stock was then of a higher value in the market than at the time the forgery was committed; (3) the dividends the company was compelled to pay the person whose name was forged; *Boston & Albany R.R. Co. v. Richardson*, 9-472.

4. **FAILURE TO SUBSCRIBE TO STOCK.** Where there is an agreement to subscribe to stock, in the future, the measure of damages upon a failure so to subscribe, would seem to be, the difference between the market price and the par value of the stock; *Mount Sterling Coal Road Co. v. Little*, 7-181.

5. **EXEMPLARY DAMAGES.** Exemplary damages will not be allowed, in an action against a municipal corporation, for a personal injury sustained by reason of the mere negligence of the corporation to repair a defect in one of its streets, which is not in the business part of the city and is but little used by the public; *City of Chicago v. Martin et al.*, 2-205.

6. —. It is difficult to conceive a case, against a municipal corporation, which would justify the allowance of exemplary damages. *Id.*

7. —. The rule is that, to justify the allowance of exemplary or vindictive damages, either gross fraud, malice or oppression must appear. In the absence of these elements, damages can not exceed and must be confined to compensation for the injury sustained. *Id.*

8. **PUNITIVE DAMAGES.** A corporation may be subjected to exemplary or punitive damages for tortious acts of its agents or servants, done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like tortious acts, would be liable to such damages; *Atl. & G. W. Ry. Co. v. Dunn*, 4-5.

9. **EXEMPLARY DAMAGES.** It is well settled that, where the conduct of a corporation is characterized by gross negligence, although there may be an absence of malice and oppression, it is

amenable to exemplary damages; *W. Un. Tel. Co. v. Eyser*, 5-161.

10. **TORTS; PUNITIVE DAMAGES.** While the principal is liable for the torts of his servant or agent in the course of his employment, a railroad company is not liable in punitive damages for the malicious and wanton acts of a conductor, in the absence of proof tending to show either that the company prompted or was privy to it, or approved it afterward; *Turner v. North Beach & Mission R.R. Co.*, 1-202.

11. **WHEN PROPERLY AWARDED.** If the wrongful act of the agent of a corporation is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable in vindictive damages; *Singer Manuf. Co. v. Holdfodt*, 6-402.

12. **INSTANCE.** Where a sewing machine was sold, to be paid for in monthly instalments, and a lease given and accepted providing that the vendor might, without process, enter and take possession of the machine for the non payment of any instalment, and the purchaser made all his payments to the agent selling the same; and afterward the vendor, by other agents, entered the purchaser's house in his absence, and with force and violence removed the machine against the remonstrances of his wife, and kept the same for one day, when the same was returned, the party so taking claiming that it was done under the belief that full payment had not been made, but the evidence showed notice of the facts to the vendor's agents, it was held, that the case was one eminently proper for the imposition of exemplary damages. *Id.*

13. —. It is well settled law, of the state of Missouri, that corporations, like natural persons, are liable in exemplary damages, when the facts of the case are of such character as to warrant them; *Malecek v. Tower Grove & Lafayette Ry. Co.*, 8-120.

See **EMINENT DOMAIN**; **LIABILITIES**; **PERSONAL LIABILITY**; **TRANSFER OF STOCK.**

DEBTOR AND CREDITOR.

1. **TRANSFER OF PROPERTY, AS BETWEEN.** An individual who is solvent, in the absence of intent to defraud creditors, may dispose of property even by voluntary conveyance, and subsequent creditors can not question the transaction. If, however, the owner of property shall dispose of such property with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel; but, a subsequent creditor will have no right to question a previous transaction in which the debtor's property was obtained from him by fraud; which the debtor has acquiesced in, and which he has manifested no desire to disturb; *Graham v. R.R. Co.*, 6-81.

2. **TRUST FUND FOR USE OF.** An excess of indebtedness of a corporation, for which, by statute, directors become liable, constitutes a fund, for the benefit of all the creditors, so far as the condition of the company renders it necessary, for the payment of debts due to them; *Horner v. Henning et al.*, 6-1.

3. **INVIOABILITY OF CLAIMS OF.** Creditors of a private corporation who are secured by mortgage upon the corporate property, by such contract of mortgage, acquire rights of which they can not be deprived, even by act of the legislature; *Montgomery & West Point R.R. Co. v. Branch, Sons & Co.*, 6-136.

4. **NOT BOUND BY CORPORATE ESTOPPEL.** It is not true that creditors of a corporation can not enforce obligations resting upon stockholders that the corporation might not be able to; *Union Mut. L. Ins. Co. v. Frear Stone Manuf. Co. et al.*, 6-481.

5. **FRAUD IN ORGANIZATION.** If a new corporation be organized, by parties interested in an older one, for the purpose of getting rid of liabilities and to fasten them on the new company, and the latter, by arrangement with the creditors of the elder organization, at trustee's sale, bids off the property of the latter for the amount of its liabilities and gives notes to its creditors, secured by trust deed on the property thus acquired, the fraud—if any—on the part of the representatives of the old company can not affect the creditors. The existence of such a state of facts will constitute no defense to a suit to compel the subscribers to stock in the new company to pay unpaid balances of their subscriptions, to satisfy the liabilities assumed by the new company; *Jewell et al. v. Rock R. P'pr Co. et al.*, 9-71.

See **ASSETS; CONSOLIDATION; CORPORATE PROPERTY; CREDITOR'S BILL; DISSOLUTION; ESTOPPEL; LIABILITIES; PERSONAL LIABILITIES; STOCK AND STOCKHOLDERS; TRANSFER OF STOCK.**

DECEIT.

1. **FALSE REPRESENTATIONS.** A fraudulent or reckless representation of a fact as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood; and a concealment of a material fact, if done in such a manner as to deceive and mislead, will give a right of action for deceit; *National Exchange Bank v. Sibley*, 10-165.

2. —. In an action, by assignee in bankruptcy of an active corporation, to recover unpaid subscriptions to its stock, the defense of false and fraudulent representations, inducing the subscription, can not be set up; *Chubb v. Upton*, 6-23.

DECLARATION OF INTENTION.

1. **CONSTRUED.** A declaration of intention to create a company, "for the purpose of locating, building, owning and maintaining a union depot for railroads in the city of Denver," and of locating, etc., "as many different lines of railroads from said

depot to the exterior boundary of the city of Denver, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," does not indicate an attempt to create an ordinary railroad company under the statute; *People v. Cheeseman*, **10-93**.

2. **CONSTRUED.** Neither is a statement in the articles of incorporation that the term of existence of the corporation shall be fifty years when the statute provided that such corporations shall exist for only twenty years, a fatal defect. *Id.*

3. **OFFICE OF.** In organizing a corporation under a general law, the declaration is an acceptance by the incorporators, under the name designated, and for the objects expressed, of the corporate powers and capacity the law confers, a statement of the principal constituents of the corporation — its name, object for which formed, amount of capital stock, names of the stockholders and the interest of each, is all that is required; *Grangers Life & Health Ins. Co. v. Kamper*, **10-21**.

DECREASE OF STOCK.

1. **STATUTORY PERMISSION.** A statute which authorizes a corporation, at any meeting called for the purpose, to reduce its capital stock and the number of shares thereof, does not empower a corporation to effect such reduction by purchasing the shares of a particular stockholder. Unless a course be adopted which will work exact and even justice to the whole body of stockholders the statute is inoperative; *Currier v. Lebanon Slate Co.*, **8-377**.

2. **WHAT IS NOT.** Where a corporation agrees with its stockholders to issue certificates of stock for the amount of their subscriptions paid in and cancel the subscription as to the amount not paid, this is not a diminishing of the capital stock, as the remaining stock still belongs to the company, to be disposed of; *Chetlain, adm'r, v. Repub. L. Ins. Co. et al.*, **6-397**.

DEDICATION.

1. **EVIDENCE OF.** When a dedication is relied upon to establish the right, the acts, of both the donor and of the public authorities, should be unequivocal and satisfactory of the design to dedicate on the one part, and to accept and appropriate to public use, on the other; *Trustees of the First Evangelical Church et al. v. Walsh et al.*, **3-280**.

2. **WITHDRAWAL OF.** A dedication of property by the state, to a private corporation, in trust for a public use, may be withdrawn at any time before its acceptance; *State Historical Assoc. v. City of Lincoln*, **9-535**.

3. **ACCEPTANCE.** The bringing of an action to recover property dedicated to public use, from a subsequent donee, is not an acceptance of the dedication. *Id.*

See **STREETS.**

DEED; see CORPORATE DEED.

DE FACTO CORPORATION; see CORPORATION DE FACTO.

DEFINITIONS.

1. "CONDITIONS PRECEDENT." By "conditions precedent" is meant any thing which, by the express provisions of the statute, is made a condition to be performed, on the part of the corporators, before and as a foundation of the exercise of powers and privileges under the charter; *Lyons v. Orange, Alex. & Man. R. R. Co.*, 3-371.

2. "DIVIDEND." A dividend, as applied to a corporation, means a sum which the corporation sets apart, from its profits, to be divided among its members; *Lockhart v. Van Alstyne*, 5-470.

3. —. The word has a technical but well understood meaning. It indicates corporate funds derived from the business and earnings of the corporation, appropriated by a corporate act, to the use of and to be divided among the stockholders; *Hyatt et al. v. Allen*, 4-624.

4. "EXPENSES." A statute of the state of California authorized the trustees of any corporation to levy and collect, for the purpose of paying "the proper and legal expenses of such corporation," assessments on the capital stock thereof. It was held, that this authorized the levy of assessments for the payment of the debts of the corporation incurred in the transaction of its legitimate business; *Sullivan v. Triunfo Gold & Silver Mining Co.*, 3-132.

5. "FOREIGN CORPORATION." A foreign corporation is a corporation created by, or under, the laws of any other state, government or country; *Daly et al. v. Nat. L. Ins. Co.*, 7-87.

6. "FRANCHISE." The word "franchise," as used in relation to corporations, means certain privileges conferred by government, on individuals, which do not belong to the citizens of the country of common right; *Abbott v. Omaha Smelting & Refining Co.*, 8-306.

7. —. The word franchise must always be considered in connection with the corporation, or property, to which it is alleged to pertain. Franchises are rights or privileges, which are essential to the operations of the incorporation. They are positive rights or privileges; *Morgan v. State of Louisiana*, 6-12.

8. "FUTURE EXTENSIONS OR BRANCHES." The words "any future extensions or branches," in a contract, between two connecting railroad corporations, for a division or drawback of freights and fares over their roads, "or any future extensions or branches on the same," must not be construed, in their general sense, to apply to extensions then unauthorized by the legislature, so as to invalidate the contract, where there were unexhausted powers, in

the charter and supplements, at the time of the contract, to build other extensions or branches, sufficient to meet the requirements of the words; an application must be given to the words consistent with the objects authorized when the contract was made; *Morris & Essex R.R. Co. v. Sussex R.R. Co.*, **3**-579.

9. "IMPROVE." A corporation was formed, under the general incorporation law of California of 1863 as amended by an act of 1864, "to buy, improve, lease, sell, and otherwise dispose of real estate" as well as "to build water front protection, slips, docks, piers, wharves, warehouses, and otherwise improve such property as may be obtained by the company." Held, that, in this connection, the word "improve" includes the performance of any act, whether on or off the land, the direct and proximate tendency of which is to enhance its value in the market; *Vandall et al. v. South San Francisco Dock Co.*, **3**-150.

10. "MAINTAINING AND SUSTAINING." The words "maintaining and sustaining" a railroad, have reference to keeping the road in repair, supplying it with machinery and such like acts; *Central R.R. Co. et al. v. Collins et al.*, **3**-224.

11. "PACKAGE." Bales of cotton, in contemplation of law, are not "packages" within the meaning of that word, as commonly understood when used in express receipts. Nor are they articles the value of which it is necessary to state to enable the carrier to understand the extent of his responsibility, or the amount of care which should be observed in their transportation, or the sum to be charged for their carriage; *Southern Express Co. v. Crook*, **3**-118.

12. "PENAL STATUTE." A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part and penal in another. The effect, and not the form, of the statute is to be considered, and if its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character, and the circumstance that, in punishing, a remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant; *Diversy v. Smith*, **9**-155; *Burkett et al. v. Plankinton et al.*, **9**-155.

13. "PRIVATE CORPORATIONS." Artificial persons, created for business purposes, clothed with certain rights and privileges, permitted to own and acquire property, for certain purposes and to a limited extent; *Ward, rec'r, v. Farwell et al.*, **6**-490.

14. —. Where the object of the creation of a corporation is not declared in the law creating it, but it appears it was to advance the private interests of land owners, in the district incorporated, and none others are embraced in its provision, although it may incidentally enhance the general prosperity of the whole community, it is none the less a private corporation; *Board etc. v. Houston*, **5**-268.

DEFUNCT CORPORATION.

1. **ITS INDEBTEDNESS; COUNTER CLAIM.** An indebtedness due to defendants from a defunct corporation, of which plaintiff was acting as manager when the indebtedness was created, will not be allowed as a counter claim in a suit for the price of goods subsequently sold by plaintiff to defendants, although, when they made the purchase, defendants supposed they were still dealing with the corporation; unless plaintiff had notice of such indebtedness and, thereafter, concealed from defendants the fact that he had succeeded to the business and was selling on his own account and not as manager of the corporation; *Field v. Hahn et al.*, 8-173.

DEMURRER; see **PLEADING.**

DEVISE.

1. **GENERALLY.** A devise of real and personal property generally, without stating the purpose, to a corporation existing for educational purposes, must be regarded as a devise for educational purposes; *Santa Clara Female Academy v. Sullivan*, 10-298.

See **ACADEMY; TRUST AND TRUSTEE.**

DIRECTORS.

1. **THEIR STATUS.** Directors are trustees of the powers and property of the corporation and the shareholders are the beneficiaries. They can exercise no power not within the province of the charter, and must bring to the service fidelity to the welfare of the beneficiaries and diligence in the performance of their duties. They are not guarantors that the methods they adopt will lead to the most prosperous results; *Tuscaloosa Manuf. Co. et al. v. Cox et al.*, 9-1.

2. **THEIR CHARACTER AND OBLIGATIONS.** A director of a corporation acts as trustee for the stockholders and as agent and representative of the corporation. He is under obligations to use his best exertions in behalf of the company in all matters relating to its affairs; *Covington & Lexington R.R. Co. v. Bowler's heirs et al.*, 4-404.

3. **ARE TRUSTEES.** Directors are but the agents and trustees of the corporation; they have power only to act for the interest of the company and not against it; *Simons et al. v. Vulcan Oil & Mining Co.*, 4-80.

4. —. Directors of a corporation are bound to act as the representatives and for the benefit of the company. They can not acquire, for themselves, the property which it is their duty to acquire for the company, and which is necessary for its purposes, nor can they purchase from the company what it is their duty to sell in its behalf. In respect to this class of dealings, they stand

upon the same footing as ordinary trustees; *Blake v. Buffalo Creek R.R. Co.*, impleaded etc., 4-620.

5. **ARE TRUSTEES.** It is a rule which rests in the soundest wisdom, and is sustained by the best consideration of the infirmities of our human nature, called for by the only safe protection of the interest of cestuis que trust or beneficiaries, viz.: That trustees and persons standing in similar fiduciary relations shall not be permitted to exercise their powers and manage or appropriate the property of which they have control to their own profit or emolument, or as it has been expressed, "shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their cestuis que trust;" *Ogden v. Murray*, 3-510.

6. —. Directors of a corporation are within this rule, and although in this case there is nothing to show that the trustees were not in the actual exercise of the highest integrity, yet the principle is one of great importance, and forbids any inquiry into the honesty of a particular case. *Id.*

7. —. Directors are regarded as trustees for stockholders, wherefore, a stockholder will be allowed, in a proper case, to maintain a suit in equity instituted to restrain them from doing acts which, while they may be within the corporate authority, would be in violation or breach of their trust, or he may procure redress for such acts after they have been performed; *Wright v. Oroville Gold etc. Mining Co. et al.*, 3-146.

8. **DUTY TO STOCKHOLDERS.** Corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted, at least, with the view to advance the interest of the stockholders and not used with a purpose to injure or destroy that interest. *Id.*

9. **TRUST RELATION.** Directors of corporations are subject to the rule governing the office of trustee, in regard to their dealings with the trust estate; *Wardell v. R.R. Co.*, 6-91.

10. —. The directors of a corporation are clothed with power to manage the affairs of their company for the benefit of its stockholders and creditors. Their character as agents forbids the exercise of their powers for their own personal ends against the interest of the company, and they are precluded from deriving any advantage from contracts of the company, made by their authority as directors, except through the company for which they act. *Id.*

11. —. In transacting the business of a corporation and in exercising its franchises, the directors are agents, or trustees, for the stockholders, and the latter are bound by the acts of the former within the scope of their authority; *Chetlain, adm'r, v. Republic Life Ins. Co. et al.*, 6-397.

12. **FIDUCIARY RELATION.** Directors manage the property of a corporation as trustees for the stockholders, and they have no right to use or appropriate the funds of their cestuis que trust to

themselves. They have no power to waste, destroy, give away or misapply the corporate property; *Holder v. Lafayette etc. R.R. Co.*, 5-258.

13. **As TRUSTEES.** The principle that the directors of a corporation are trustees for the stockholders, relates only to their acts in connection with the property held by the corporation itself. It has no application to a purchase of stock in the company by a director from a stockholder; *Board of Commissioners v. Reynolds*, 5-340.

14. —. The directors of corporations are trustees of the stockholders, and, in a certain sense, of its creditors. Any agreement to influence their action for the benefit of others, and to the prejudice of the company, is fraudulent and void; *Bliss v. Matteson & Litchfield*, 4-540.

15. **TRUSTEES FOR CREDITORS.** When the franchises, track, etc., of a railroad corporation are sold under execution, the directors become trustees, by virtue of the statute, and all unsold property of the company passes to such trustees, for the benefit of any creditors of the company; *Good v. Sherman et al.*, trustees, 4-197.

16. **DISQUALIFICATIONS.** The fiduciary relations of directors not only inhibit them as grantees from purchasing an individual grant from themselves, so as to bind their company to them individually for its purchase money, but also forbid that they should, by subsequent resolutions, create, revive, or continue a debt for such a purpose in their favor against the company; *Coleman et al. v. Second Ave. R.R. Co.*, 3-603.

17. **DISABILITY.** A director of an incorporated company can not become a contractor with the company, nor can he have any personal and pecuniary interest in a contract between the company, of which he is a director, and a third person; *Port et al. v. Russell et al.*, 4-381.

18. **CAN NOT MAKE PROFIT TO HIMSELF.** A director of a corporation can not, by an agreement with his co-directors, sell the bonds of the company and realize a profit thereon. If he does so he will be required to account for that profit to the creditors or stockholders; *Widrig & Co. v. Newport St. Ry. Co.*, 10-463.

19. —. A director so selling is a trustee for both creditors and stockholders, and they will be protected against such bargains. *Id.*

20. **ADVANCING MONEY FOR CO-DIRECTORS.** A director advancing money for his co-directors is entitled to a contribution from them. *Id.*

21. **LOAN BY.** Directors and other officers of a corporation may, when they honestly deem it for the interest of the corporation to borrow, advance it money on terms as favorable as any on which they could have procured the money from other sources; *Sutter St. R.R. Co. v. Baum*, 10-69.

22. **LOAN BY.** But, where a director uses his official position to obtain an undue advantage in making a loan to the corporation, he is not entitled to recover the amount charged as expenses for making and acknowledging the mortgage. *Id.*

23. **SECURING PERSONAL FAVORS.** The managing director of a corporation can not use for his own personal benefit, without payment therefor, the property of the company, unless by consent of its proper officers, and if he does so the company may recover of him the value of the use so taken; *N. O. & B. S. Packet Co. v. Brown*, 10-507.

24. **FRAUDULENT DEVICES.** All arrangements, by directors of a company, to secure undue advantage to themselves, at the expense of the corporation, as by the foundation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and, then, that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are unlawful devices, in fraud of stockholders and condemned by courts whenever brought in for consideration; *Wardell v. R.R. Co.*, 6-91.

25. **DEALING WITH COMPANY.** A director, acting in good faith and fairly, may as lawfully advance money to his corporation, upon the faith of its securities, as any one else; *Darst v. Gale et al.*, 6-380.

26. **INTEREST IN CONTRACT.** A director can not, legitimately, acquire an interest adverse to the corporation of which he is a director. If he purchase any claim against the company it is in trust for the company. If he enters into a contract for the company he can not, personally, derive any benefit from it. If, subsequent to the letting of the contract, he acquires an interest therein, he must still account, for profits, to the association; *European & North American Ry. Co. v. Poor*, 4-421.

27. **PURCHASING COMPANY PROPERTY.** A director is a trustee for the corporation, and, it being his duty to act in good faith toward his cestuis que trust, it is a breach of trust, on his part, to create any relation between himself and the trust property, whereby it becomes his interest to subserve his individual interests at the expense or to the injury of the beneficiary of the trust property; *Cov. & Lex. R.R. Co. v. Bowler's heirs et al.*, 4-404.

28. **SALE TO THEMSELVES.** Ordinarily the law frowns upon contracts made by directors in their representative character, with themselves as private persons, but such sales are not necessarily void. They are carefully watched and their fairness must be shown. Such sales are supported in equity, where the fiduciary relation of the purchaser has ceased before the purchase, when the purchase was made with full consent of the stockholders, or where stockholders have, by their acquiescence, debarred themselves from questioning the transaction; *Ashurst's Appeal*, 4-71.

29. **CONTRACT FOR HIS BENEFIT.** A director of a corporation can not make for himself, or for his own benefit, a contract which will bind the company. Such contract may be repudiated, by the company, at the instance of any stockholder ; *Guild, exec. etc., v. Parker, rec'r, 8-401.*

30. —. A board of directors who have, by contract, made a barter of the assets of their corporation for their personal gain, can not, by an act purporting to be an acceptance, for the company, of an equivalent for such assets, conclude the stockholders, or their representatives, from showing that no equivalent was actually received. *Id.*

31. —. A director of a corporation can not make a contract with himself, or for his own benefit, which will bind the company. The contract may be repudiated by the company, at the instance of a stockholder ; *Gardner et al. v. Butler et al., 8-413.*

32. —. The Accessory Transit Company was a corporation created by the republic of Nicaragua, for the purpose of carrying freight and passengers between the city of New York and certain ports on the Pacific. It had seven directors and purchased seven steamships of Cornelius Vanderbilt. The title to the ships, however, by resolution of the board of directors, was transferred to three trustees (each of whom was then a director of the company), to evade the acts of congress relative to the registration of vessels, in which foreigners hold an interest. After the passage of an act of congress enabling the company to hold the vessels in its own name, the trustees transferred the ships to the company. Afterward they demand compensation of the company, claiming that where an active trust for the care, management, conveyance and appropriation of personal property has been created and the instrument creating the trust makes no provision for the compensation of trustees, they are prima facie entitled to the same commissions as are by statute allowed to guardians, executors and administrators. The company subsequently became insolvent and was placed in the hands of a receiver ; one of the trustees died ; the other two brought suit against the receiver to recover the compensation claimed. The court held, (a) that under the circumstances, the trust was in contravention of the laws of the United States, and could not be upheld for any purpose ; and, (b) that the fiduciary relation of the trustees, as directors of the company, prohibited them from in any way securing to themselves a personal advantage in the administration of their trust ; *Ogden v. Murray, 3-510.*

33. **INTERESTED IN CORPORATE CONTRACT.** The North Missouri Railroad Company was heavily indebted and unable to make sale of its bonds, except at a ruinous sacrifice, nor could it otherwise provide the means necessary for the completion of its road. An association was formed, the purpose of which, as expressed in its articles, was the purchase of the bonds remaining unsold and, ul-

timately, if found profitable so to do, the purchase of the road itself, provided the association could obtain the control of the corporation. The bonds were subsequently purchased of the company, thrée of the corporate directors being members thereof, at a price some ten per cent. above their then market value, and the association was allowed to name a majority of the directors. The transaction was assailed as fraudulent in fact. It was held, that the stipulation on the purchase that the purchasers should acquire control of the company was nothing more than a proper security for the proper application of the money advanced on the security of the bonds and the court could not presume from the provision as to the purchase of the road that, in the event of such purchase, the purchase would be made other than in a lawful manner, and under circumstances authorizing such purchase; there was in the transaction, no taint of actual fraud; *Kitchen et al. v. St. Louis, Kansas City & Northern Ry. Co.*, 8-199.

34. INTERESTED IN CORPORATE CONTRACT. It being objected that the above transaction was constructively fraudulent inasmuch as three of the eighteen directors of the corporation were members of the purchasing association and the sale of the bonds was a sale to themselves; the court found, from the evidence, this objection urged to the transaction was not supported by the facts, but, if such had been the fact, it would not make the sale void. *Id.*

35. —. The mere fact that one or more persons proposing to advance money to an embarrassed corporation, to enable it to complete the purpose of its creation, are directors and a minority of the board of directors to which the proposition is made and by whom it is accepted does not vitiate and render the contract based upon the proposition void; but, such contract will be voidable only, at the election of a party whose interest has been so represented by the party claiming under it. *Id.*

36. TRUSTEE SELLING TO HIMSELF. A sale of the property etc. of an insolvent corporation was made by trustees under its mortgage bonds, the trustees making the sale being members of the association who made the purchase and owning one thirty-fourth part of the whole capital of the association. This fact did not render the sale void, but it gave the company a right to redeem within a reasonable time and before the intervention of new equities. *Id.*

37. ENFORCING DEBTS PURCHASED AT A DISCOUNT. Where directors of a corporation purchase the indebtedness of the company from its creditors, such purchase does not discharge the debt and absolve the company from its obligation to pay. The only effect would be to limit the amount of such purchasers' recovery against the company to the amount actually paid for the debts. *Id.*

38. ACQUIESCENCE OF CESTUI QUE TRUST. While a cestui que trust has a right to come in to a court of equity and ask that a sale

of trust property made by a trustee to himself be set aside his coming must be timely ; he has no right to lie idly by until new equities arise and speculate on the success or non success of the investment or transaction of which he complains and see others in good faith and without fraud, by a vast expenditure of money, make that valuable which was before valueless and then come and ask aid of the chancellor to enable him to appropriate to himself such benefits and advantages. *Id.*

39. **INSTANCE.** A director of a railroad corporation purchased the railroad and appurtenances thereof, belonging to the corporation, at a judicial sale had under foreclosure of its mortgage, not having the consent of the corporation and without the permission of the chancellor by whom the sale was decreed. It was held, that the corporation had a right to have its road surrendered to it upon placing the director, who purchased it, in statu quo. The company had a right to take the benefit of his bond or to demand a re-sale ; *Cov. & Lex. R.R. Co. v. Bowler's heirs et al.*, 4-404.

40. **INSOLVENCY OF CORPORATION.** The insolvency of a corporation is no defense against its suit to recover its property from, or to fasten a trust upon, a director of the company who wrongfully became the purchaser of such property at a judicial sale thereof. *Id.*

41. **FRAUDULENT CONTRACT.** The directors of a railroad company can not acquire such an interest in the profits of a contract for the construction of the road as to give them a standing in a court of equity to interpose an objection to a compromise between such company and its contractor ; *Paine et al. v. Lake E. & Louisv. R.R. Co.*, 1-386.

42. — ; **RATIFICATION OF.** An arrangement made by directors, securing to themselves a share in the profits of a contract for the construction of a railroad, can be ratified and confirmed, only, by the stockholders. *Id.*

43. **PRESUMPTION.** There is no legal presumption of illegality or unfairness, in transactions between two corporations, from the mere fact that a portion of the board of directors of the one company constitute a part of the board of directors in the other at the same time, and participate in the dealings between the two corporations, such dealings being within the scope of the powers delegated by the stockholders ; *Booth et al. v. Robinson et al.*, 7-419.

44. **FRAUD AND REDRESS.** Directors of a company can not bind the stockholders by allowing profits to the vendor of property purchased by the company, after holding out, in a prospectus, advertisement, etc., that the property was obtained at original prices. Such a fraud may be redressed by an action in the name of the corporation ; *Simons et al. v. Vulcan Oil & Mining Co.*, 4-80.

45. AS CREDITOR. A director may become a creditor of the corporation of which he is director, by loaning money to it; he may take security for re-payment; may enforce the security; and, may bid at a judicial sale had and purchase the property, upon which he is secured; *Hallam v. Indianola Hotel Co. et al.*, 6-580.

46. —. Creditors of a corporation have a right to receive pay, in money or goods, and the fact that being creditors they are also stockholders and directors does not modify, or abridge, the right, so long as there is no actual fraudulent intent; *Smith, adm'x, et al. v. Skeary*, 6-317.

47. —. If stockholders and directors may deal with the corporation, in their individual capacity, the law will protect them as it will any other parties. Their relation to the corporation, however, is admissible as evidence bearing on the question of good faith in the particular transaction. *Id.*

48. —. While a director may deal with his company and may acquire its property sold at execution sale, such liberty is to be exercised, subject to the rules which belong to his peculiar position, as one bearing such fiduciary relations that his dealings with the subject matter of his trust, or agency, and the party confided to his care, are viewed with jealousy and may be laid aside on slight grounds; *Hallam v. Indianola Hotel Co. et al.*, 6-580.

49. —. A corporation transferred a quantity of goods to two of its directors, who were also creditors, to be sold by them and the proceeds applied in payment of a joint claim, of large amount, which they justly held against the company. The corporation was, in fact, insolvent; but, it was supposed, by the parties, at the time, it was able to pay all its debts and liabilities. The transaction was in good faith and there was no intention to defraud creditors. The supreme court of Connecticut was unable to discover any principle of law which rendered the transaction fraudulent; *Smith, adm'x, et al. v. Skeary*, 6-317.

50. —. Where a director, who was also president, of a banking corporation, loaned a sum of its funds to others upon their interest bearing note, and, in consideration of the loan, received to himself an agreement that he should share in the profits of the adventure to carry out which the money was loaned, it was held, that equity will not permit such officer to thus profit to the exclusion of the shareholders and a recovery was approved; *Farmers & Merchants Bk. etc. v. Downey*, 6-251.

51. ELECTIONS BEFORE ORGANIZATION ILLEGAL. Under an agreement of stockholders of a state bank, authorizing the conversion of such bank into a national bank, the stockholders proceeded to appoint directors of the, to be, national bank. This was not a legal election of directors; such election could not be had until organization; *Lockwood v. Mechanics Nat. Bk.*, 4-140.

52. QUALIFICATION; NOT STOCKHOLDERS. Where the statute of a state providing for the organization of a corporation does not

require its directors to be stockholders of the association, the discretion of the stockholders in electing directors is not limited to persons holding stock; *State, ex rel. Att'y Gen'l, v. M'Daniel et al.*, 4-20.

53. **RETIRING.** Where a director of a corporation sold out his stock and ceased, thereafter, to take any part in the management of its affairs, or in the meetings of its directors, he was not bound to see that a successor was elected in his place, or to tender a formal resignation, and he was not responsible for the acts of those in its management at the time of its dissolution, some five years after he had thus severed his connection, although no successors to the directors then in office were ever elected; *Sturges, adm. etc., v. Vanderbilt, impleaded*, 8-523.

54. **HOLDING OVER.** The acts of a board of directors, of a corporation, elected, under charter authority, to act until the end of a day certain, when its successors would assume the powers of the office, after the expiration of the term for which they are appointed are valid, as to persons not being the state or stockholders of the company; *Thorington v. Gould*, 6-147.

55. **MEETINGS; NOTICE OF.** Every member of a board of directors had notice of a special meeting and was in attendance. Held, that as to whether the notice was given verbally or in writing was immaterial; *Samuel v. Holladay*, 1-139.

56. **MEETING OF, POWER TO ACT.** In case of a definite body, like a board of bank directors, a majority must be present, at a regular meeting or at a special meeting, notified according to by-law, if there be any, or otherwise reasonably notified to all the members (except, perhaps, cases of absence at a distance), without fraud or attempt at surprise, and, at such meeting, a majority of those present can act for the whole, and the meeting will be presumed to be regular unless the contrary appears; *Lockwood v. Mechanics Nat. Bank*, 4-140.

57. **POWER OF A MAJORITY OF A QUORUM.** At a meeting of directors, at which the execution of a mortgage of defendants' realty and fixed machinery was authorized, three directors were present, two of whom concurred in the adoption of the resolution. Five members constituted the board of directors, of which number three were a quorum. Held, that the mortgage was authorized, a quorum being competent to act and two being a majority of the quorum, wherefore, the mortgage was valid; *Wells et al. v. Rahway White Rubber Co.*, 13-592.

58. **IRREGULARITY OF.** Mere irregularity in the vote of directors, as that one voted by proxy, does not warrant the interference of a chancellor to prevent the consummation of a resolution; *Dudley v. Kentucky High Sch.*, 5-382.

59. **RELATION TO STOCKHOLDERS.** The officers and directors, of a corporate body, are the trustees of the stockholders and can not, without being guilty of fraud, secure to themselves advantages not

common to the latter; *Farmers & Merchants Bk. etc. v. Downey*, 6-251.

60. **THEIR RELATION TO STOCKHOLDERS.** Directors of a stock corporation can only be regarded as mandatories, persons who have gratuitously undertaken to perform certain duties and who are, therefore, bound to apply ordinary skill and diligence in the administration of the affairs of the association: *Spering's Appeal*, 4-129.

61. **RELATION TO STOCKHOLDERS.** Directors, in joint stock corporations, are not, in the strict and technical sense of the term, trustees for the stockholders. They are, however, in one sense, trustees and they occupy a fiduciary relation to the corporation and its stockholders. The confidence reposed in them and the position they occupy, toward the corporation and its stockholders, require a strict and faithful discharge of duty and they are not allowed to derive, from their position, either directly or indirectly, any profit or advantage whatever, except it be with the full knowledge and concurrence of the company, represented by others than themselves; *Booth et al. v. Robinson et al.*, 7-419.

62. —. The relation of directors to stockholders in the same corporation is that they shall discharge their duties faithfully to the extent of their ability, as mandatories. They do not insure the fidelity and honesty of those employed by them; and, as gratuitous bailees they are not responsible for loss unless occasioned by fraud or gross negligence on their part; *Dunn's adm'r v. Kyle's exec'r*, 7-174; *Moran's adm'r v. Kyle's exec'r*, 7-174; *Dunn's adm'r v. Davis*, 7-174.

63. —. The directors of a corporation are the agents of the corporation and the trustees of the stockholders in the business of the corporation and may not exceed their agency or violate their trust. As between themselves and the company, their power is conferred by the incorporators and must not be exceeded. As between the corporation and the stockholders, the latter are not bound by the act of the board of directors outside the ordinary business and general purpose of the company; *Board of Comm'rs et al. v. Lafayette etc. R.R. Co. et al.*, 7-26.

64. —. The directors of a corporation are its primary agents, and, in reference to corporate property, act in the relation of trustees. The character of their relation requires of them the highest and most scrupulous good faith in their transactions for the corporation and the stockholders. The law does not permit them to manage the affairs of the corporation for their personal and private advantage, nor pecuniarily to be interested in contracts with other parties made with the corporation, through their influence and direction; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

65. **CONTROL OF STOCK.** The directors of a corporation have no control or authority over the property of a stockholder in his

shares, or any duty in regard to sale or transfer of it, except to see that proper regulations and facilities for transfer are provided; *Board of Comm'rs v. Reynolds*, 5-340.

66. **THEIR LIABILITY.** Directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or willful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, and for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors; *Spering's Appeal*, 4-129.

67. **MISCONDUCT IN OFFICE.** An individual stockholder, in a corporation, may maintain an equitable action against the directors of such corporation, for misconduct in office, when the corporation itself is unable, or, through fraud or collusion, omits to sue. When the directors are charged with fraud, it is not necessary for the stockholder to apply to them for the use of the corporate name in bringing suit; *Mussina v. Goldthwaite*, trustee etc., 4-195.

68. **MISUSE OF FUNDS.** It is not competent for the directors of a corporation to use funds in payment of a note executed by themselves to the president of the corporation, as payee, for its benefit; *Gallery v. Nat. Exchange Bk. of Albion*, 6-632.

69. **REMEDY.** Where a stock corporation has incurred indebtedness in excess of its capital stock, to various persons, and by statute the directors and officers of the corporation assenting thereto are made liable for such excess to the creditors of such corporation, their liability can not be enforced by action of law, at the suit of an individual creditor. The remedy is in equity, where the rights and liabilities of all in interest may be determined and properly adjusted; *Low, use etc., v. Buchanan*, 6-454.

70. —. If, in such case, an action at law can be maintained by a single creditor, on the ground there are no other creditors, he must set forth the special circumstances warranting his action, by proper averments in his declaration. *Id.*

71. **LIABILITY FOR ACTS ULTRA VIRES.** When directors of a corporation are sought to be held responsible to stockholders for acts ultra vires, and in violation of the company's charter, the question will be, were such acts the result of mistake as to their powers, and if so, did they fall into the mistake from want of proper care, that is, such care as a man of ordinary prudence practices in his own affairs. If the mistake be such as with proper care might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as they might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of their company, they ought not to be liable; *Spering's Appeal*, 4-129.

72. **EXEMPTION FROM LIABILITY.** Directors are not liable for mistakes of judgment, even though they may be so gross as to

appear to others absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body. *Id.*

73. ACTS OF CO-DIRECTORS. The mere fact of being a director and stockholder is not per se sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged. It is only when a director lends his name and influence to promote a fraud upon the community, or is guilty of some violation of law, or other mismanagement, that he is personally liable; *Arthur v. Griswold, executor etc., et al.*, 4-609.

74. —. The facts that the name of a person was published as a trustee, and a certificate of stock issued to him, are not sufficient to authorize a verdict based upon false representations. *Id.*

75. FUNCTIONS OF. Generally a director is authorized to act as a member of the board of directors, in all matters touching the business concerns of the corporation and the management of its affairs; when not acting as a member of the board, he has no authority to represent the corporation, or to bind it by his acts, unless authorized by some proper action of the board; *Chicago & N. W. Ry. Co. v. James et al.*, 4-218.

76. DELEGATION OF POWER TO, EXCLUSIVE. Where the corporate powers are vested in a board of directors, the proceedings of a stockholders' meeting can not be shown to establish a disavowal, by the corporation, of the acts of one who, without authority, has assumed to contract for it. The delegation of power to the trustees or directors is exclusive; *Union Gold Mining Co. v. Rocky Mountain Nat. Bk.*, 5-176.

77. GENERAL POWERS. The general power, in a charter, delegating, to the directors, the performance of all corporate acts, refers to the ordinary business transactions of the corporation and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock; *Ry. Co. v. Allerton*, 5-39.

78. DISCRETIONARY POWERS. The directors (or other board of management) having general authority to manage its concerns, are vested, by law, with the only discretionary power that can exist, in any one, to carry on the corporate business; *People, ex rel., v. Judge of St. Clair Circuit*, 5-478.

79. POWERS. Directors of a corporation have no right to do an act which is foreign to the purposes of its creation; *Ashurst's Appeal*, 4-71.

80. —. The general rule is, that directors of a corporation may do any act, within the powers of the company, unless restrained by the by-laws or by the special votes of the stockholders, at their meetings; *Wood Hydraulic Hose Mining Co. v. King*, 4-344.

81. POWERS OF; DIVISION OF PROPERTY. Directors of a corpo-

ration, in reference to the corporate property, act in the relation of trustees, the stockholders being the *cestuis que trust*. The directors can make no disposition of the corporate property which shall not inure to the equal benefit of all the stockholders. If they attempt to divide, they must so divide that each shall receive his proportionate share. They can not agree for and bind the stockholders to any other division; *Hale v. Republican Bridge Co.*, 4-396.

82. POWER TO LEASE. A board of directors, of a railroad company, has no authority to execute and deliver a lease for years of the road and property of the corporation they manage, giving to the lessees power to operate the road and to demand and receive tolls for transportation over it; *Stevenson et al. v. Davison*, 4-203.

83. LEASE OF FRANCHISE. A by-law of a railroad corporation provided that no contract shall be made "involving the franchise of said road, except the same be approved by a general meeting, representing a majority of the stock, after being recommended by a majority of the stockholders." The directors executed a lease to two individuals of the road of the company, together with all its property and rights of every kind, both real and personal, with some exceptions named, for the term of ten years, upon certain considerations. Held, that, while such a lease does not involve the essential franchise of the company to be a corporation, it does involve the franchise to take tolls upon the road of the company, which comes within the meaning of "the franchises of said road" as expressed in said by-law; wherefore, the directors were without power to execute it. *Id.*

84. POWER; FORM OF CONTRACTING. The stockholders of a corporation, by a two-thirds vote, resolved to lease the property of the corporation. The board of directors adopted resolutions settling the specifications, and providing that public notice should be given inviting sealed proposals for leasing the property, according to the specifications, and reserving to themselves the right to reject any and all bids. The proposals received were opened, examined and rejected. At the meeting at which this was done, another bid was made, received and accepted against the objections of some stockholders and directors. It was held, that the course to be pursued was in the discretion of the directors, and that the adoption of the one mode did not preclude them from afterward pursuing another; *Ricau v. Baquie et al.*, 1-575.

85. JUDICIAL CONTROL OF DISCRETION. Courts will not interfere to control the exercise of the discretion vested in the board of directors of a corporation. *Id.*

86. PRESUMPTION AS TO. A director is conclusively presumed to know the pecuniary condition of his company; *Jones, M'Dowell & Co. et al. v. Arkansas Mech. & Agric. Co.*, 6-213.

87. PRESUMPTIVE KNOWLEDGE OF. The doctrine that the di-

rectors of a corporation — in this case a bank — are conclusively presumed to know the financial condition of the corporation, its general business and its receipts and expenditures, as shown by its regular books, is for the protection of third parties dealing with the bank, and of the bank against the prejudicial action of any director, and can not be invoked to uphold a wrongful appropriation of moneys by the cashier or other officer, which appropriation is made and also entered upon the corporate books without the actual knowledge of the directors; *First Nat. Bk. v. Drake*, 9-340.

88. COMPENSATION. If directors are employed in the business of the company and agree to pay themselves a stipulated sum, the agreement is void and no recovery can be based upon such contract; but, for such services as they render, they can recover upon the quantum meruit; *Gardner et al. v. Butler et al.*, 8-413.

89. —. The president and directors of a corporation, occupying the position of trustees of the fund and property of the company, are not entitled to any compensation for ordinary services, as such officers, unless such compensation be fixed by by-law or resolution of the board of directors, passed before the services are performed; *Gridley v. Lafayette, Bloomington & Mississippi Ry. Co.*, 5-260.

90. COMPENSATION OF. Where a director of a corporation is appointed to act as its treasurer, no provision being then or previously made, by by-law or resolution, for his compensation, it will be presumed the fulfillment of the duty was regarded as a part of his duty as director, and he will have no right to claim pay for the same. A subsequent allowance of such a claim, in his favor, will not warrant a recovery; *Holder v. Lafayette, Bloomington & Mississippi Ry. Co.*, 5-258.

91. EXTRAORDINARY SERVICES. A president or director of a corporation, performing extraordinary duties, not pertaining to his office, may recover compensation for such; *Gridley v. Lafayette etc. Ry. Co.*, 5-260.

92. —. Where one not connected with the management and disposal of the corporate property, performs services for the corporation, or where directors are employed, as agents, to perform duties disconnected from their office, and no rule of public policy is, thereby, violated, compensation for such services may be allowed and recovered; *Holder v. Lafayette etc. R.R. Co.*, 5-258.

93. —. To audit an account for ordinary services of the president and to draw an order to pay the same, no compensation having been provided before the services were rendered, is illegal, and no recovery can be had upon the same; *Gridley v. Lafayette, B. & M. Ry. Co.*, 5-260.

94. BANK; STATUTE OF MAINE. Under the statute of the state of Maine the directors of a bank are personally responsible for losses or deficiency of capital stock of the corporation, occurring

because of their mismanagement. They are liable for mismanagement during the time for which they were chosen and acted. They are not answerable for renewals of worthless paper, discounted by a board of which they were not members. *Bank of Mutual Redemption v. Hill*, 1-588.

95. **INDIVIDUAL LIABILITY ; WINDING UP AFFAIRS.** That a manufacturing corporation has ceased to do business and is engaged in closing up its affairs, is no excuse for a failure of trustees to comply with the requirement as to the filing of an annual report of the capital and indebtedness of the company, and does not, in the absence of a legal dissolution, affect the liability of the trustees, to a creditor, imposed for the failure to file such report ; *Sanborn v. Lefferts*, 4-647.

96. **PERSONAL LIABILITY.** Under the law of Michigan the liability of directors does not extend to contingent liabilities of the corporation, but only to present debts ; *Lockhart v. Van Alstyne*, 5-470.

97. **LIABILITY FOR FALSEHOOD.** A director of a corporation who knowingly issues, or sanctions the circulation of a prospectus containing false statements as to material facts, the natural tendency of which is to deceive and to induce the public to purchase the corporate stock, is liable for the damages sustained by one who, relying upon and induced by the statements, makes such a purchase, and an action can be maintained where the false statements were one of, although not the sole inducement to, the purchase ; *Morgan v. Skiddy et al.*, 5-567.

98. —. The mere fact that a trustee allows his name and credit to be used to float the stock of a corporation which, afterward, turns out to be worthless, in the absence of evidence of knowledge on his part, or that he has made or sanctioned any false representation, does not constitute actionable fraud. *Id.*

99. **PERSONAL LIABILITY.** An incorporation act authorized the organization of corporations, to be managed by not less than three nor more than eleven directors. These were to elect a president, secretary and treasurer. After the first year of corporate existence the directors were to be annually elected by the stockholders. The corporation, acting through its president and at least a majority of its directors, was required annually, and within a time fixed, to make and publish a report, showing its financial condition. On failure to make such report, in the event any person or persons should be misled or deceived, and damaged by such failure all the officers who had failed to make such report were declared to be jointly and severally liable for all resulting damages. The right of action accrues against the delinquent officers, from the failure of the corporation to make the report. In a suit to recover, under the statute, it is, therefore, necessary to show by express averments that the parties charged constituted a majority of the directors at the time of default ; *Niles et al. v. Dodge*, 7-113.

100. **PERSONAL LIABILITY.** To render the directors of a corporation personally liable for injuries alleged to be occasioned by conduct willfully fraudulent, in intent and purpose, amounting to breaches of trust, the proof in support of the allegations must be other than of mere constructive fraud or breaches of trust; there must be affirmative proof of the misconduct charged, tending to establish the fraud in fact; *Booth et al. v. Robinson et al.*, 7-419.

101. **LIABILITY FOR ABUSE OF TRUST.** An association of fifteen persons, consisting among others of two of the directors of a railroad corporation, one of whom was its president and the other its treasurer, was formed to obtain a contract for the construction of the railroad of said corporation; to gain the control of the corporation, by the issuance to the association, as part payment of the work to be done, of a majority of the stock of the corporation; to depreciate and render valueless the shares of certain stockholders and acquire for the association the property and effects of the corporation. At a meeting of a bare quorum of the directors of the corporation, at which the president and treasurer attended, a proposal was received from C., who was a member of the association, on behalf of himself and his associates, whose names were concealed, to construct the road. The directors referred the matter to the president of the corporation. He made the contract therefor with C., as previously arranged by the association; but, in fact, for the joint interest of all the members of the association, which included the president and treasurer. To further conceal the true character of this arrangement, C. transferred the contract to G. & Co., and under the latter name the work was done. This transfer was merely colorable; the work was performed, expenses paid and profits divided by the association. The name of G. & Co. was only another style for the association. With the majority of the stock issued under the contract, seven of the association were chosen directors of the corporation, constituting a majority of that body. Ever since, a majority of the directors has been selected from the association. The president, who executed the contract, has been continued in office as a director and president. Held, that the said contract, made by the president in the name of the corporation with C., for the benefit of himself and his associates, is fraudulent and void; and that the corporation may call its officers to account for their willful abuse of their trust, or for any misapplication of the funds of the corporation, or for any profits realized under the fraudulent contract; and, further, all the persons who participated with the directors and officers of the corporation, in their fraudulent and unlawful transactions, with full knowledge of all the facts, are equally liable with said officers; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

102. **ACTION AGAINST.** The corporation is the proper and primary party to call its directors to an account, in a court of equity,

for fraud or breaches of trust in the management of its affairs. To enable a shareholder, either for himself alone or for himself and others, to maintain a bill against directors, for fraud or breaches of trust in the management of the corporate affairs, he must allege and show not only the violations of duty or breach of trust on the part of the directors charged, but, as well, that he, as a stockholder, has been damnified thereby and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong. If, however, a bill be filed by stockholders and the proof shall sustain allegations made that a majority of the shares are owned by another company and that a majority of the directors are adverse to the interest of the plaintiffs, and are combined against them, and would frustrate and defeat any attempt to induce the corporation to take action for the wrongs complained of, such facts would be a sufficient excuse for not making or alleging a formal demand upon the corporation to take action; *Booth et al. v. Robinson et al.*, 7-419.

103. **WHEN NOT INDIVIDUALLY LIABLE.** Directors of a corporation are not personally liable for the debts of a corporation, provided they have complied with the requirements of the statutes defining their duties and have managed the company's affairs without fraud. They are not responsible for mere errors of judgment, or want of prudence, in conducting or closing up its business; *Lyman v. Bonney et al.*, 7-445.

104. **JURISDICTION OF EQUITY AS TO.** A director, by reason of the trust relation, is precluded from asserting rights under a lease, procured by him in disregard of his duty as a trustee, hostile to the company of which he is a director. The declaration and enforcement of such a trust are peculiarly within the province of a court of equity. Wherefore, when the trustee comes into equity, claiming its protection for his alleged legal title, as against the cestui que trust, it is competent for the court to declare that title subject to the trust and to restrain the trustee from asserting any further claim in violation of the trust; *Blake v. Buffalo Creek R.R. Co.*, impleaded etc., 4-620.

105. **JURISDICTION OF EQUITY.** When the acts of directors are outside of, and beyond the scope of their authority, the stockholders are not bound by such acts and may, no doubt, within a reasonable time, proceed in equity to have the acts cancelled and their rights protected from injury and loss growing out of the unauthorized acts; *Chetlain, adm'r, v. Republic Life Ins. Co.*, 6-397.

106. **JURISDICTION OF EQUITY.** In equity, directors of a corporation are personally liable for the consequences of frauds or malfeasance they may be guilty of, or for such gross negligence as amounts to a breach of trust, to the damage of the corporation or its stockholders. They are not liable for the consequences of unwise or indiscreet management, if their conduct is entirely due to

mere defaults or mistakes in judgment; and the onus of proof of fraud, combination or gross negligence, to render directors personally liable, is upon the party making the charge. The charge must be distinctly made and fully supported by proof; *Booth et al. v. Robinson et al.*, **7-419**.

107. STATUTE OF LIMITATION AS TO ACTS OF. An action against a director of a corporation for gross negligence in regard to the affairs of the company during some period of his official incumbency as such director, will be barred by lapse of time, under the statute of limitations; *Spering's Appeal*, **4-129**.

DISFRANCHISEMENT OF MEMBER; see **EXPULSION OF MEMBER.**

DISSOLUTION.

1. EFFECT AT COMMON LAW. By the principles of the common law an absolute and unqualified dissolution of a corporation, by a decree of forfeiture or legislative repeal, extinguishes its rights of action and property; *Nat. Pahquioque Bank v. Nat. Bank of Bethel*, **3-176**.

2. —. Upon dissolution of a corporation, by the common law, debts due to it or from it become extinguished; *Ramsey v. Peoria M. & F. Ins. Co.*, **3-271**.

3. POWER OF COURT TO DISSOLVE. Where a corporation has ceased to do business, leaving debts unpaid, and is insolvent, and unable to prosecute the work for which it was organized, the court under the twenty-fifth section of the corporation act has power to dissolve it; *St. L. & S. Coal Co. v. Sandoval Coal & Mining Co.*, **10-292**.

4. MUST BE AUTHORIZED BY STATUTE. To decree the absolute and final dissolution of a corporation, at the suit of an individual, is no part of the general jurisdiction of a court of law or equity, and can be authorized only by express statute; *Folger v. Columbian Ins. Co.*, **3-387**.

5. NOT TO BE PRESUMED. The ownership of property is not essential to the existence of a corporation; and the courts will not treat it as actually dissolved because its condition would warrant steps to be taken for its dissolution; *Sullivan v. Triunfo Gold etc. Mining Co.*, **3-132**.

6. JUDICIAL ACTION NECESSARY. To prevent the harsh operation of the common law rule it is settled that a dissolution by forfeiture can only be affected by judicial proceedings against the corporation, taken for that purpose, an opportunity for a hearing and a judgment of forfeiture rendered thereon; *Nat. Pahquioque Bk. v. Nat. Bk. of Bethel*, **3-176**.

7. JUDICIAL DETERMINATION NECESSARY. A national banking association does not lose its corporate existence or become dissolved by mere default in the redemption of its circulating notes,

nor by the appointment, by the comptroller of the currency, of a receiver of its assets. Before it shall be declared dissolved, the question of violation of its charter must be judicially determined; *Bank of Bethel v. Pahquioque Bk.*, 4-241.

8. JUDICIAL QUESTION. Violations of the act authorizing the incorporation of a national bank must be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought by the comptroller of the currency in his own name, before the association can be declared dissolved; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 4-298.

9. JUDICIAL QUESTION, REQUIRING DIRECT ACTION. A corporation enjoined from the exercise of its corporate franchises and deprived of its property, and which has, thus, ceased to exist, for all practical purposes, is not thereby actually dissolved. It can not be dissolved, save by the judgment of a court of competent jurisdiction. Until such judgment is rendered, creditors may proceed, by suit, against it, unless restrained by injunction, and its stockholders do not cease to be such; *Kincaid v. Dwinelle*, 5-560.

10. ONLY BY DIRECT PROCEEDING. A corporation can not be dissolved in a collateral proceeding, and, in a suit to recover money loaned, a national bank must stand until it is dissolved by a direct proceeding; *Un. Gold M'g Co. v. Rocky M. N. Bk.*, 4-298.

11. QUESTION CAN NOT BE TRIED COLLATERALLY. A plea in avoidance of a promissory note executed to a corporation, because of its dissolution, brought by payee against maker, must show that the corporation has come to an end by legal process; *Pres. and Trustees v. Hamilton*, 3-295.

11½. COLLECTION OF, AFTER BUSINESS DISCONTINUED. The adoption, by a corporation, of a resolution to discontinue its business does not operate to work a dissolution of the company; nor does it deprive the corporation of the power to enforce assessments on stock owned, by action; *Choteau Ins. Co. v. Floyd*, 8-282.

12. ORGANIZATION UNDER GENERAL LAW. That a corporation derives its existence and franchise from a general law, and not by special charter, in no way affects the nature and duration of the franchise granted or the mode in which it may be dissolved; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

13. WHEN NO JURISDICTION. A court will not take jurisdiction to dissolve a corporation as an easy and convenient mode of dissolution, when the purposes of its organization could not be successfully prosecuted, or to impose a penalty of forfeiture of its charter, upon mere vague apprehension of some future mischief; *In re Franklin Telegraph Co.*, 7-449.

14. JUDGMENT OF. Where a corporation is proved to have been guilty of such neglect as is made, by its charter, cause for the forfeiture of its franchises, which forfeiture the state demands, a court has no discretion to refuse judgment of ouster or dissolution

on the ground that private or public interest will be better subserved by preserving the existence of the corporation; *State of Ohio v. Pennsylvania & Ohio Canal Co.*, 4-54.

15. BY EFFLUX OF TIME. Where pending an action, against a corporation, on a dormant judgment, the charter of the company expires, the court will properly dismiss the action, the charter being a public law, of which courts take cognizance; *Terry v. Merchants & Planters Bank of Savannah*, 9-45.

16. —. If the act of incorporation fixes a definite time in which the charter shall expire, when that period of time expires the corporation is dissolved. But, when the continuance of the corporation beyond a fixed time is made to depend upon the performance of a given condition, then the non performance of the condition is a mere ground of forfeiture. That can be taken advantage of by the state only, in the proceeding in the nature of a quo warranto, and the existence of the corporation can never be collaterally called in question, and this is so where it is expressly provided that, upon failure to comply with the condition, the corporation shall be dissolved; *LaGrange & Memphis R.R. Co. v. Rainey et al.*, 4-175.

17. BY LAPSE OF TIME; ACTION THEREAFTER. From the date of its incorporation to the date of action commenced, which latter date was about ten years after, by lapse of time the corporation became defunct, the company owned various town lots. Members of the company received lots from it and received the proceeds of lots sold by them, which, in fact, belonged to the company. After the date (1865) when the company ceased to exist as a corporation, an action could not be maintained in the name of the corporation against a member of the corporation who had received property from the company, or had received more than his pro rata share of its property, or owed it money. In such case the only remedy would be an action by one or more of its members, against the others, for an accounting, and to settle and close up all the affairs of the company; *Krutz v. Paola Town Co.*, 7-124.

18. EXPIRATION OF CHARTER TERM. Upon the expiration of the term of the existence of a corporation, as limited by its charter, it becomes extinct; no formal decree of dissolution is necessary, and a judgment thereafter against it, in an action then pending, is void, unless the action be continued by order of the court, as provided for by statute (*Laws of N. Y.*, 1832, ch. 295), to prevent the abatement of actions by or against corporations; *Sturges, adm'r etc., v. Vanderbilt, impleaded etc.*, 8-523.

19. —; TRUSTEESHIP. The provisions of a statute, of New Jersey (*Laws of New Jersey*, April 15, 1846, § 29), constituting the directors and managers of a corporation trustees thereof upon its dissolution, does not continue its existence as cestui que trust and render it capable of defending in its corporate name, where

the corporation has expired by the termination of the period for which it was created. *Id.*

20. REINSTATING DISMISSED CAUSE. A corporation being dissolved by efflux of time, limited in its charter, an action at law against it being dismissed as brought against one dead, in the absence of others made parties defendant, a motion to reinstate the original cause and appoint a receiver is properly overruled; *Terry v. Merchants & Planters Bank*, 9-45.

21. WRIT OF ERROR AFTER. If a corporation is absolutely extinct, so as to be presumed civilly dead, no writ of error can be prosecuted in its name to correct an error in the circuit court; but, it should be prosecuted in the name of the receiver, where one has been appointed, as its legal representative, and the law in this respect can not be changed or suspended by a decree of any court, foreign or domestic; *Life Association of America v. Fasset*, 9-119.

22. PLEADING. Every pleading which sets up matter in abatement which does not appear of record to be effective must be verified by affidavit; otherwise it should be stricken from the files, on motion. So, a suggestion of the dissolution of a defendant corporation by its receiver and successor, the receiver not seeking to be made a party and his paper not verified, can not be acted on by the court and the plaintiff is not bound to answer it, as a plea in abatement. *Id.*

23. DEFECTIVE ALLEGATION AS TO. The statement, in a petition, that a corporation — in this case a bank — has long since ceased to transact business, is insolvent and has no property or assets of any description out of which the money alleged to be due can be collected by execution or other process of law, is not equivalent to an allegation that the corporation is dissolved; *Valley Bank & Savings Inst. et al. v. Ladies Congregational Sewing Soc.*, 9-331.

24. UNTENABLE CLAIM OF. A corporation was, by its charter, to continue in existence for a period of five years. Five years elapsed; and then S. commenced an action against the corporation and others to recover the land which he had formerly conveyed to the corporation, claiming that the corporation had been dissolved by lapse of time and that the land reverted to him. Held, such claim is not tenable (*Comp. L. 1879, 223*); *Sword v. Wickersham*, 9-356.

25. ESTOPPEL. Although a member of a corporation after it had ceased to exist, by lapse of time, might have sold property belonging to it and might have received the proceeds thereof, and, in doing so, might have dealt with the company as a corporation, he would not be estopped from setting up the defense that the company had, prior to that time, ceased to exist as a corporation, and that, therefore, it no longer had any capacity to sue its members as such. There is no rule of equity, or public policy, authorizing an estoppel to be interposed in such a case; but, on

the contrary, it would be against equity, and would, also, be against public policy; *Krutz v. Paola Town Co.*, 7-124.

26. **ENTERING JUDGMENT AFTER.** When a corporation has been legally dissolved, by expiration of the time limited for its continuance by the terms of its charter, or articles of incorporation, during the pendency of an action in the name of the corporation, it is not error of the trial court in its discretion and in furtherance of justice, to refuse to enter judgment on a verdict in favor of the extinct corporation, and to set aside the verdict and grant a new trial, upon the payment of all costs by the defendants, although the question of the existence of the corporation is not raised in the pleadings and the expiration of the charter is proved by documentary testimony offered in behalf of the corporation; *Eagle Chair Co. v. Kelsey & Simpson*, 7-161.

27. **BY SURRENDER.** The general rule is that the acceptance by the government of the surrender of corporate existence is essential to effect a dissolution of the corporation. Exception is sometimes made where, by the charter of incorporation, the stockholders are made individually liable for the debts of the corporation; *LaGrange etc. R.R. Co. v. Rainey*, 4-175.

28. **FAILURE TO HOLD MEETINGS.** The neglect of a corporation to hold meetings for a period of ten years will not operate to dissolve the corporation; *State v. Barron et al.*, 8-391.

29. **IN-ACTION.** A corporation is not dissolved by merely ceasing to exercise its powers; *Proprietors of Baptist Meeting House v. Webb et al.*, 7-282.

30. **BY ABANDONMENT.** A turnpike company was incorporated in February, and organized, under its charter, in March, and opened stock subscription books in April, of the same year, and the next year commenced the work of constructing its road, and by the end of the fifth year completed about one-third of it, and made no progress in the manual labor of constructing the road for the next four years, but completed the entire road in the succeeding four years, being in all about thirteen years from the date of the company's charter. This can not properly be regarded as an abandonment of the enterprise, when the board of directors of the company did not intend to abandon it, but continued to hold meetings regularly, and to make efforts to obtain subscriptions to the stock of the company, and progressed with their works as fast as their means would permit. Payment of stock subscribe for when the books were first opened, can not be resisted on the ground that the road was not built within a reasonable time; *Gibson v. Columbia & New Richmond Turnpike and Bridge Co.*, 3-665.

31. **NON USER.** Where a corporation is organized for the purposes of the promotion of education, the conducting of experiments in agriculture, the testing of soils and the cultivation of trees; and, to carry out these purposes, the corporation is, by its

charter, authorized to locate a college, at a certain place, to purchase real and personal property, but not to hold, at any one time, more than 5,000 acres of real property ; and, the corporation is, afterward, duly organized and for a time carries out the purposes for which it was created, but, afterward, transfers all its property, both real and personal, and ceases to maintain a college, or to perform any of the other duties or things required or authorized by its charter, and remains in such a condition for nearly nineteen years ; and, at the end of such time, the attorney general commences a civil action in the nature of a quo warranto, in the name of the state, for the purpose of obtaining a judicial determination dissolving the corporation, the action can be maintained ; State of Kansas, *ex rel., v. Pipher et al.*, 9-329.

32. NON USER. It is no defense to such action that a suit is pending at the time, brought by the corporation against a grantee of its realty, to recover some of such real estate which the corporation had conveyed to such grantee nearly nineteen years prior to that time. *Id.*

33. BY ACT OF THE CORPORATION. Where a by-law was enacted, that the corporation should be dissolved on a day named, the corporation, by force of such by-law, became dissolved ; Merchants & Planters Line *v. Waganer*, 10-12.

34. BY TRUSTEES. Where there are no stockholders in a corporation, the trustees may take the necessary steps to dissolve it, and convey the corporate property, first paying the corporate debts, when in their opinion such dissolution and conveyance will the better secure the corporate purpose ; People *v. Pres. and Trustees*, 1-161.

35. APPOINTMENT OF LIQUIDATORS. Where there is no insolvency of the corporation, and no complaint on the part of the stockholders, the right of the stockholders to choose their own liquidators upon the winding up of the corporate affairs will not be denied, notwithstanding there may have been such acts on the part of the corporation as might warrant the interference of the state to forfeit its charter and appoint a liquidator under the statute ; State *v. Herdic Coach Co.*, 10-478.

36. BY DEATH OF MEMBERS. By the death of all its members a corporation aggregate is dissolved. So when, by death or disfranchisement, so few remain that, pursuant to its fundamental law, they can not continue the succession, the corporation is, for all purposes of action, dissolved. The corporation remains, however, so long as there are corporators in number sufficient to continue the succession ; Blackwell *v. State of Kansas*, 6-210.

37. BY DEATH, HOW SHOWN. When a corporation has been dissolved by the death of its members this fact may be shown collaterally. *Id.*

38. WINDING UP. A loan of money was made to an educational corporation, the lenders agreeing to look to the rents of the

property, the income of the school and the aid of the state for re-payment. By means of these resources, about one-half the indebtedness was cancelled. The buildings were then destroyed by fire, no effort was made to restore them and there was no user of the corporate franchises. It was held, that in this condition of things, the directors having broken their implied contract to keep up the income to which the lenders had agreed to look, they could not resist the sale of the company's property under the prayer of the bill to wind up, etc., this being the only means of repaying the borrowed money; *Moss v. Harpeth Academy*, 4-188.

39. POWER OF COURTS. An act of Connecticut provides that the superior court, as a court of equity, may, on the application of any stockholder in any corporation, organized under the laws of that state, wind up the affairs of the corporation and dissolve the same, whenever it shall appear, to the court, that the corporation has voted to wind up its affairs, or has abandoned the business for which it was organized, and has neglected, for an unreasonable time, to wind up its affairs and distribute its effects among its stockholders. In a case where a railroad company had so abandoned its business and neglected to wind up its affairs; held, that it was not a sufficient reason for a refusal to dissolve a corporation that (a) the company had received franchises from other states as well as this; the dissolution affecting only the franchise conferred by this state. (b) That the company had been carried into bankruptcy and that its assets were in the hands of assignees in bankruptcy. (c) That the abandonment of business had not been of the free choice of the company; but, compelled by legal proceedings, and other causes, it could not successfully resist; *Hart v. Boston, Hartford & Erie R.R. Co.*, 5-185.

40. POWER AS TO SUITS AFTER. Where a corporation surrenders its charter, or where it ceases to exist by the efflux of time, or where its charter is declared forfeited by a judicial tribunal of competent jurisdiction, it can neither sue nor be sued, although the obligation of its contracts survive and may be enforced against any property that belonged to the corporation which has not passed into the hands of bona fide purchasers; *City Ins. Co. of Providence v. Commercial Bk. of Bristol*, 5-219.

41. DEFECTIVE. In a suit, based on the statute of New York, by a stockholder of a corporation chartered under the laws of that state, against the corporation, for a violation of its charter in declaring and paying a dividend out of its capital stock, a decree of the supreme court of that state declaring the corporation dissolved is in excess of the jurisdiction of the court, and therefore entitled to no faith and credit in another state as a judicial proceeding; *Folger v. Columbian Ins. Co.*, 3-387.

42. EFFECT OF GENERAL ASSIGNMENT. The act of a corporation in assigning its property to a trustee, for the payment of the debts

of the corporation and to distribute the surplus, if any, does not work a dissolution of the corporation; *De Camp et al. v. Alward*, 7-76.

43. **RECEIVERSHIP.** A corporation having been dissolved by judicial decree and its effects having been delivered over to the charge of a receiver, authorized to collect moneys due to it, such receiver is entitled to maintain a suit against a stockholder of the defunct corporation for a balance due on his subscription to its capital stock; *Stillman v. Dougherty*, rec'r, 7-361.

44. **PERSONAL LIABILITY.** It seems that if the appointment of a receiver ipso facto dissolved a corporation (which it does not), and it was thereafter incapable of being sued, the condition precedent of suit against stockholders having, thereby, become impossible of performance, it would not longer be in force, and the creditor's right of action would be perfect, without an attempt, first, to recover of the corporation; *Kincaid v. Dwinelle*, 5-560.

45. **NATIONAL BANKS; APPOINTMENT OF RECEIVER.** The appointment by the controller of the currency of the United States of a receiver, the taking into his possession (by such receiver) of the assets of a national bank and the institution of proceedings to wind up its affairs did not operate to forfeit the franchises of the bank or dissolve the corporation in such sense that a creditor could not maintain an action against it, even upon a claim disallowed by the receiver; *Nat. P. Bk. v. Nat. Bk.*, 3-176.

46. **JUDICIAL ASCERTAINMENT.** An act which provides that "when . . . the corporation is restrained from further prosecution of its business, or is dissolved . . . the court upon the application of the auditor, etc., may, at any time before the expiration of said two years, appoint . . . receivers," etc., requires that final decree of dissolution be passed before the appointment of receiver to dispossess the corporation of its estate, etc.; *Ward*, rec'r, *v. Farwell et al.*, 6-490.

47. **PARTIES TO PROCEEDINGS.** Where a right is sought to be enforced against a corporation, and the relief asked will only affect the stockholders as such, and no discovery or relief is sought against them as individuals, such stockholders are not necessary parties to a bill in chancery, for dissolution. *Id.*

48. **TRIAL BY JURY.** An act, providing in certain contingencies, for the dissolution of corporations and the appointment of receivers, is of an equitable nature and not void, in that it does not provide for trial by jury. Even if the party have constitutional right to that mode of trial, it does not, necessarily, follow an act not expressly providing for such right would be invalid. If the right exists, the constitution has already provided for it, and it is to be presumed that a court would order such trial of contested issues, unless upon waiver of the right. *Id.*

49. **CONSTITUTIONAL PROCEEDINGS FOR.** A statute which authorizes the auditor of state to proceed to the dissolution of a corpo-

ration when he shall be of opinion the company is insolvent, or its condition such as to render its further continuance in business hazardous to dealers with it — in this case parties insured — or to the public, or where the company has failed to comply with the rules, restrictions or conditions required by law, is not unconstitutional as impairing the obligation of contracts. This is the more so when the corporation shall have formally adopted the act as an amendment of its charter; *Chicago Life Ins. Co. v. Aud. of Public Accounts*, 9-79.

50. CONSTITUTIONAL PROCEEDINGS FOR. Nor is such an act repugnant to a constitutional provision prohibiting the passage of special laws regulating the practice in courts of justice. It is not special legislation if it applies to all corporations of a specific class — as to all insurance companies — in like predicament. *Id.*

51. BANKRUPTCY. The bankruptcy of a corporation does not put an end to the corporate existence, nor vacate the office of the directors. A corporation created by a state can not be dissolved by an act of congress or by administration thereof through the federal courts; *Holland v. Heyman*, 7-10.

52. —. Bankruptcy of a corporation and proof of a plaintiff's claim against the estate in bankruptcy do not dissolve a corporation or prevent a recovery of judgment against it for the purpose of charging its officers and stockholders therewith; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

53. —. A corporation which is insolvent and has been adjudicated a bankrupt, under the federal bankrupt act, is dissolved. A dissolution, so effected, is sufficient to authorize creditors to bring suits against its stockholders, under the statute of Missouri, without joining the company in the suit; *State Savings Ass'n v. Kellogg et al.*, 8-95.

54. —. A statute which provides that stockholders shall not be personally liable for any debt contracted by the corporation unless suit shall be brought against the corporation within one year after the debt becomes due, does not apply when the corporation has been dissolved by bankruptcy. Such suit against the corporation would be a useless form, and the law will not enforce an act which would be frivolous. *Id.*

55. EFFECT. Upon dissolution, the existence of a corporation, as a legal entity, is ended, and judgment could no more be rendered against it, in a suit previously commenced, than judgment could be rendered against a dead man dying pendente lite. All pending suits are abated unless there is a prolongation of corporate life, for this specific purpose, granted by enactment of the sovereignty as in the case of the original creation; *Nat. Bank v. Colbv*, 5-82.

56. —. Upon the dissolution of a corporation for literary purposes, in which there are no stockholders, and which owes no debts, all its property acquired by purchase for value vests by

operation of law in the state. That acquired by donation reverts to the donors; *People v. Pres. and Trustees*, 1-161.

57. COLLEGE OF CALIFORNIA. The president and trustees of the college of California had power to convey its property to the state, to be applied in establishing and supporting a state university. *Id.*

58. EFFECT ON DEBTS. Debts due to a moneyed corporation do not become extinct upon its dissolution; *M'Coy et al. v. Farmer et al.*, 8-169; *Kansas City Hotel Co. v. Sauer* (note), 8-169.

59. STOCKHOLDERS' LIABILITY ON. A statutory provision that the stockholders of a corporation are liable for all debts due, at the time of its dissolution, to the extent of their stock, creates a primary and absolute liability on the part of the stockholder on the dissolution of the company; and a bill in equity will lie to enforce such liability without averring the insolvency of the company and without previous suit against it; *Spence v. Shapard et al.*, 6-118.

60. ACTION AT LAW NOT LIE AGAINST STOCKHOLDERS ON. The supreme court of Alabama declines to follow the New York ruling, that, under such statute, an action at law may be maintained by creditors against individual stockholders. *Id.*

61. STOCKHOLDER'S LIABILITY. The liability of a stockholder, under a statute which provides that if any company * * * dissolve, leaving debts unpaid, suits may be brought against any person, or persons, who were stockholders at the time of such dissolution, without joining the company in such suit, is secondary and contingent and the statute only relieves the creditor from pursuing the company in case of its dissolution; *Perry et al. v. Turner et al.*, 8-111.

62. —. The charter of a manufacturing corporation expired by statutory limitation. He who was its general agent, appointed during the existence of the corporation, continued to carry on the business and to contract debts. For one debt he executed and delivered a promissory note in the name of the corporation. In an action against the stockholders, seeking to charge them as makers of the note, on the ground that there was an implied contract of co-partnership between them, it appeared that defendants, six months after the expiration of the charter, received dividends as from the earnings of the corporation, but, without notice that it was not so paid and without actual knowledge of the expiration of the charter; also that credit was not given to them as partners or individuals, but to the supposed corporation. The court held that, upon the expiration of the charter, the title to the corporate property vested in the trustees then in office, in trust for the creditors and stockholders; that the defendants, being merely *cestuis que trust*, could not, without other evidence of proof of their interest, be charged as co-partners; and that if they had received any part of the earnings of the business car-

ried on after the corporation ceased to exist, this did not make them liable in an action at law upon the contracts made by the agent, nor did it amount to a ratification of his acts; *Central City Savings Bk. v. Walker et al.*, 8-464.

63. RIGHTS OF CREDITORS. It is a well settled rule that a dissolution of a corporation in any other mode than by legislative repeal or by judicial decree does not affect the right of creditors; as to their rights and the remedies for their enforcement the corporation will be deemed to continue in existence; *Nat. Pahquioque Bk. v. First Nat. Bk.*, 3-176.

64. CLAIMS; ENFORCED. In respect to a dissolved corporation, it is not necessary that a claimant shall have procured a judgment and return nulla bona, before he can proceed in equity against property belonging to the corporation that has not passed in to the hands of innocent purchasers. Such property remains a trust fund, subject to the cognizance and control of a court of equity, for the benefit of creditors; *Howe v. Robinson*, 10-142.

65. —. Scire facias can not be maintained and a judgment and execution had thereon against a dead corporation. *Id.*

66. CLOSING UP. When the act under which an incorporation was had, provided that when the corporation was dissolved, the court decreeing such dissolution might appoint a receiver, with power to prosecute and defend suits, in the name of the corporation, held; in a suit in another state, by a receiver so appointed, in the name of the corporation, the decree of dissolution of the corporation was no bar; *Lycoming Fire Ins. Co. v. Langley*, 10-542.

67. PRIORITY OF CREDITORS. The creditors of a corporation have a lien or priority of payment in preference to the stockholders. The latter are the owners of the franchise, property and assets of the company which remain after its debts and liabilities are discharged. *St. L. & S. Coal Co. v. Sandoval C. & M. Co.*, 10-292.

68. PURCHASE BY NEW COMPANY — PURCHASER SUBROGATED. Where a new company purchased the assets of an insolvent corporation and advanced an amount of money sufficient to pay all the creditors of the old company in full, and they were so paid, the new company is entitled to be subrogated to the rights of the creditors, notwithstanding that the deed from the receiver under which it is held was declared void. The old company holds the legal title to the property as trustee for the benefit of the new company, cestui que trust, to the extent to which the purchase money of the latter discharged the debts. *Id.*

69. REPEAL OF ACT. In this case it is held, that the corporation was not dissolved by the repeal of the act under which it was organized; the repealing act containing a saving clause as to all corporations already organized; *Barron Creek Co. v. Beck*, 10-333.

70. **REPEAL OF ACT.** A proceeding by a corporation to enforce a judgment for collection of benefits is not affected by the act repealing the statute under which the corporation was organized. *Id.*

71. **CREDITOR'S BILL.** An action, in the nature of a creditor's bill, can not be maintained by a creditor of an extinct corporation, to reach funds of the corporation paid out to stockholders before dissolution, without a valid judgment and execution against the corporation or its successors, or without first exhausting the creditor's remedies against the property remaining in the hands of the corporation, or received by its trustees, on its dissolution; *Sturges, adm'r etc., v. Vanderbilt, impleaded etc.*, 8-523.

72. **REVERSION OF FRANCHISE, ETC.** Upon a dissolution of the corporation the franchises can not be transferred, but they revert to the sovereignty from which they were derived and the shareholders become partners, or joint owners, in the assets; *Black et al. v. Delaware & Raritan Canal Co. et al.*, 5-547.

73. **ON ALLEGATION OF PERSONAL LIABILITY.** A technical dissolution of a corporation is not essential to relieve a trustee from the consequences of not filing an annual statement after the organization had been practically abandoned; *Losee et al., executors, v. Bullard, impl.*, 8-630.

74. **INSTANCE.** A judgment was obtained against a manufacturing corporation in 1867; no annual statement was thereafter filed. The company was organized in 1873 with three trustees. No officers were thereafter elected. It ceased to do business during 1865. In 1870 two of the trustees sold out their stock to their co-trustee and never afterward acted, and the third trustee thus became the sole stockholder. The sole act done by him thereafter was to pay a debt of the corporation incurred some time in 1865. Action was brought in June, 1875. The corporation was practically abandoned and statutory provisions as to filing reports did not apply to it. Even though successive defaults could continue or renew the liability, default must be, as they were not shown to have been, committed within three years before action commenced. *Id.*

75. **CONTINUING ACTION.** The mode of continuing an action against a foreign corporation after its dissolution is a matter of practice, governed by the laws of the state in which the action is pending; *Sturges, etc., v. Vanderbilt, etc.*, 8-523.

76. **ESTOPPEL TO ASSERT.** Quære, whether the acts of those who were directors of a corporation at the time of its dissolution in, thereafter, defending an action, then pending against the corporation, will estop them from questioning the validity of the corporation. *Id.*

77. **ADMINISTRATION OF EFFECTS.** By statute of Massachusetts in whatever manner dissolution occurs, the corporation remains such during three ensuing years for the purposes of suit by or

against it, and that it may wind up its affairs; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

78. ADMINISTRATION OF EFFECTS. Where a statute provided that upon the dissolution, by any means, of a corporation it should continue in existence during a period of three years for the settlement of its concerns, at the expiration of such period, the corporation absolutely expires and ceases to be, and no valid judgment can, thereafter, be rendered against it in an action at law. Such a judgment recovered is wholly void, as if it had been rendered against a dead person; *Thornton v. Marginal Freight Ry. Co. et al.*, 7-467.

79. DECREE OF DISSOLUTION. Where a decree rendered against a corporation, in terms, declares it to be dissolved and appoints a receiver, yet in other parts thereof authorizes suits to be brought and defended, in the name of the corporation, for the purpose of winding up its affairs and paying its debts, and it is, also, authorized, for the same purposes, to make, in its corporate name, all necessary conveyances of its property and effects; the corporation will not be treated as absolutely extinguished; but regarded as kept in existence to collect and apply its assets to the payment of its debts; *Life Association v. Fassett*, 9-119.

80. EFFECT OF, ON PROPERTY. Upon the dissolution, or civil death, of a corporation all its real estate, by the strict rule of the common law, reverts to the original owners, or their heirs, and, all its personal estate vests in the crown in England and the state here, and, all debts due to or from it are by operation of law extinguished. A court of equity will, however, upon the dissolution, or civil death, of a corporation, lay hold of its corporate property, as a trust fund for creditors and shareholders and distribute it for their benefit. *Id.*

81. PRIOR ATTACHMENT, LIEN OF. The lien of an attachment rightfully acquired by a levy upon the property of a corporation, domestic or foreign, doing business in the state of Illinois and holding property there, will not be defeated by a decree, under insolvent proceedings, dissolving the corporation and appointing a receiver to take charge of its assets and effects. The corporation will be treated as still existing for the purpose of enforcing the attachment lien, by proceeding to judgment and execution. *Id.*

82. SETTLEMENT OF AFFAIRS. It is the settled policy of the state of Illinois, so far at least as concerns domestic corporations, that upon their dissolution, however that may be effected, they shall be regarded as still existing for the purpose of settling up their affairs and having their property applied to the payment of their just debts. No reason is perceived why the same policy should not, so far as practicable, be extended to foreign corporations owning property within the state and located therein for business purposes. *Id.*

83. **SETTLEMENT OF AFFAIRS ; DEATH OF SOLE DEFENDANT.** Where the fact of the death of the sole defendant to a suit is admitted, or the court itself is cognizant of such fact, it will not be justified in entering up a judgment without the legal representatives of the deceased being first made parties. In such a case, if the plaintiff does not, within a reasonable time, take the proper steps to make them parties, the court should, on its own motion, enter a judgment or order that the suit abate. *Id.*

84. **ABATEMENT ; DEATH OF PLAINTIFF.** The death of a plaintiff — in this case an insurance company — pending the suit must be taken advantage of by plea in abatement, otherwise the judgment in his name will be binding. *Id.*

85. **JUDGMENT AFTER.** By the common law and in the absence of any statutory provision on the subject, a judgment against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained or the suit commenced before the death of the party, makes no difference. This rule of the common law, as to judgments against natural persons, is still in force in Illinois. *Id.*

86. **STATUS.** The continuance of a corporation after the time fixed in its by-laws for dissolution, is merely permissive, and it can only be regarded as a joint stock company, liable to be terminated at the will of any party interested; *Merchants & Planters Line v. Waganer*, 10-12.

87. **DOING BUSINESS AFTER.** The continuance in business of a corporation which has been dissolved will not change the relative rights and liabilities of the shareholders, so long as they continue to act in joint adventure, and they will be presumed to have agreed to be governed by the same authority and rules as those which governed the corporation. *Id.*

88. **RESCISSION OF FRAUDULENT ACTION ; AVOIDING.** A statute authorized the dissolution of a corporation by judicial proceeding, "for reasonable cause;" upon petition by a "majority in number or interest of the members." It was alleged in an information that a telegraph company had, by its directors, leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the lessee company, in which a majority in interest of the stockholders of the lessor company were also interested. It appeared by an additional answer, filed by leave, the lease complained of had been cancelled. Held, there continued no reasonable cause; In re Franklin Telegraph Co., 7-447.

See **CONSOLIDATION ; DEFUNCT CORPORATION ; FORFEITURE ; QUO WARRANTO ; SURRENDER OF CHARTER.**

DIVIDEND.

1. **DEFINITION.** The word "dividend," when used in reference to corporate stock, has a technical, but well understood meaning.

It indicates corporate funds, derived from the business and earnings of the corporation, appropriated by a corporate act to the use of and to be divided among the stockholders; *Hyatt et al. v. Allen*, 4-624.

2. DEFINITION. A dividend in the common understanding of the term, as applied to a corporation, means a sum which the corporation sets apart from its profits to be divided among its members; *Lockhart v. Van Alstyne*, 5-470.

3. WHAT CONSTITUTES. Profit upon the capital or investment of a corporation, either made or paid to stockholders without declaration of a dividend, or a dividend declared, becomes the measure of a state tax on dividends; *Commonwealth v. Pittsburg, F. W. & Chicago Ry. Co.*, 5-608.

4. TO BE EQUAL. The directors of a corporation have no power to discriminate between the stockholders, unless such power of discrimination is conferred by the company's charter; *Jones v. Terre Haute & R. R.R. Co.*, 4-628.

5. STOCKHOLDER'S INTEREST. A stockholder, in a corporation, has an interest, in proportion to the amount of his stock, in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in the business of the company. This right does not depend upon the time when he became a stockholder, but attaches whenever he acquires the stock, and entitles him to all subsequent dividends. The ownership of stock necessarily carries with it the right to all the advantages and benefits incident thereto. *Id.*

6. CONTROL OF DIRECTORS. The net earnings of a corporation remain the property of the corporation until a dividend is declared by the directors. The application of net earnings to the improvement of the business of the corporation, or their distribution as dividends, is in the discretion of the board of directors; *Minot v. Paine*, 1-597.

7. STOCK DIVIDENDS. A stock dividend of net earnings increases the volume of the capital stock, and should not be considered merely as income upon the original stock. *Id.*

8. INCREASE OF SHARES. The nominal or arithmetical increase of shares, without transferring to the stockholders any thing from the treasury or property of the company, is not a dividend or profit either made or declared; *Comm. v. Pittsb., F. W. & Chi. Ry. Co.*, 5-608.

9. CASH DIVIDENDS. Cash dividends should always be treated as income, and not as increase of capital; *Minot v. Paine*, 1-597.

10. APPLICATION OF PRINCIPLES. If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation. shares of additional stock distributed to the trustees as a lawful dividend thereon accrue as capital, although they represent net earnings of the corporation. *Id.*

11. DESCRIBED; BEQUEST. Dividends, whether in cash, bonds or other evidences of indebtedness are the natural increase of corporate stock and not an accumulation of its corpus, nor is this proposition affected by the fact that no dividends are declared on the stock for a considerable space of time and, when declared, the amount thereof is unusually large. Therefore, under a bequest of the income of stock to a life tenant, such dividends belong to him and not to the remainder man; *Millen et al., by next friend, v. Guerrard, trustee, et al., 9-59.*

12. —. A will bequeathed certain shares of stock — of a railroad corporation — in trust, providing that the income should be paid to a life tenant, with remainder over. Dividends, whether in cash or in certificates of indebtedness, are part of the income — or increase — of stock and pass to the life tenant. *Id.*

13. HOW PAYABLE. Where a dividend upon its stock is declared by a corporation, payable in money, it belongs to the person holding the stock at the time of the declaration, without regard to the source from which or the time during which the profits and earnings were acquired, and regardless of the amount of the dividend; *Richardson v. Richardson, 10-521.*

14. —. The same rule applies whether the dividend comes from assets set aside as a "renewal fund," by a gas light company, the directors voting to convert the fund into a dividend. *Id.*

15. —. Under ordinary circumstances, dividends of stock go to the capital. All money dividends are profits and income, and belong to the tenant for life, including not only the usual annual dividend, but all extra dividends or bonuses payable in cash from the earnings of the company. *Id.*

16. GUARANTY INDORSED. Where there is indorsed upon stock certificates, a guaranty, as "five per cent. semi-annual dividend guaranteed" from a date fixed, signed by the treasurer, it will not be construed as a guaranty to pay at all events, but, only to pay dividends, from earnings, in preference to stockholders holding common stock; *Lockhart v. Van Alstyne, 5-470.*

17. VOID CONTRACT TO PAY. An agreement by a corporation, to pay interest or dividends on its capital stock, without reference to its ability to pay such from its earnings, is contrary to public policy, and, therefore, void. *Id.*

18. WHEN IT ACCRUES TO THE STOCKHOLDER. The net profits of a corporation remain the property of the company, and are inseparable and undistinguishable from it, until, by resolution of the directors, they are separated and set aside as dividends. When declared, they become the property of the then stockholder; *Hager v. Union Nat. Bk., 5-417.*

19. DIVIDENDS, HOW MADE. A deficiency of dividends for one year from want of earnings, is not to be made up from the net earnings of another year; the by-law contemplates that all net

earnings are to be wholly distributed each year; Belfast etc. R.R. Co. *v.* City of Belfast, 10-534.

20. **WHEN COURT WILL DECLARE.** As a rule, officers of a corporation are the sole judges of the propriety of declaring dividends; but, they may not act illegally, wantonly or oppressively, and when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will compel the company to declare it. *Id.*

21. **DECLARING DIVIDEND NOT EARNED.** Provisions of a statute declaring the trustees of a corporation who shall vote for the declaring and crediting of any interest, or dividend, in excess of the interest or profits earned, personally liable, to the corporation, for the amount of the excess does not limit the interest, which may be lawfully voted, to net profits. If a trustee vote for a dividend less than the whole amount of interest, or profits, earned (in this case a savings bank) without any deduction therefrom for expenses, although the earnings have not, then, been actually received, he does not, in the absence of fraud or bad faith, overstep his statutory duty and is not liable to the penalty; Van Dyck, rec'r, *v.* M'Quade, 9-582.

22. —. In such a case, a trustee can not avoid liability for the reason that the manner of voting and recording the vote, prescribed by the statute, was not followed. The direction of the statute is given for his protection and he can waive it; but, he can not avail himself of the omission. *Id.*

23. **WHEN DUE.** It is well settled that stockholders of a corporation are not entitled to any dividend of the profits until all the debts of the corporation are paid; Chi., R. I. & P. R.R. Co. *v.* Howard et al., 1-1.

24. **STOCKHOLDER'S RIGHT TO.** A shareholder in a corporation has no legal right to the property or profits of a corporation until a division is made. Profits do not accrue to the stockholder until they are set apart, by the corporation, for their use. Where, therefore, a contract is made in relation to dividends or profits, it must be deemed to have reference to dividends or profits to be ascertained and declared, by the particular company, and, not to growing profits from day to day, or month to month, to be ascertained upon an investigation, by third persons or courts of justice, into the accounts and transactions of the company; Hyatt et al. *v.* Allen, 4-624.

25. **OWNERSHIP AND DISTRIBUTION.** Stockholders of a corporation have no claims to a dividend until it is declared. Until that time the dividend belongs to the corporation, precisely as any other property the corporation may own. When a distribution of such funds, whether of the whole or a part, is ordered, the distribution should be made between those who, at the time, were the owners of the stock; Goodwin et al. *v.* Hardy et al., 3-350.

26. **DECLARED, A VESTED INTEREST.** The moment a dividend is declared and credited, it becomes the property of him in whose favor it is declared, and he is entitled to it. It is thenceforth a trust in the hands of the corporation, to which the stockholder has acquired vested rights and to which he is entitled in preference to the creditors of the corporation; *Van Dyck, rec'r, v. M'Quade*, 9-582.

27. **RIGHT OF STOCKHOLDERS TO.** An incident to shares of stock in a corporation is the right to receive all dividends by the owner and holders of the same after the purchase thereof; that is, their proportional share of all profits not divided when such purchase is completed; and, it is immaterial at what times or from what sources these profits have been earned. The assignment of a share of stock, from one owner to another, conveys and transfers not only the stock, but, as incident thereto, the right to share in the profits of the corporation, in the proportion which the stock so transferred bears to the whole capital stock used in the enterprise for which the corporation was organized; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

28. **OWNERSHIP OF.** Whoever owns the stock in a corporation at the time a dividend is declared owns the dividend also; *Bright v. Lord et al.*, 7-55.

29. **SALE OF STOCK AFTER, DECLARED.** A sale of stock in a corporation after a dividend is declared, will not carry the dividend with it, though it may not be paid, or payable, until after the sale. *Id.*

30. **SURPLUS PROFITS.** A corporation — a gas light company — having an accumulation of surplus profits, which it had invested in real estate and mains, issued to its stockholders certificates, each to the effect that the stockholder named therein had an interest in its property to the amount specified, upon which the company stipulated to pay interest, reserving the right to redeem such certificates, or each of them, upon ten days' notice, by paying the amount in money or stock. It was held, that the issuance of the certificates did not affect the status of the accumulation as surplus profits; that, at most, they were but agreements to divide at some indefinite time; *People, ex rel., v. Board of Assessors*, 8-566.

31. **CLOSING TRANSFER BOOKS.** The closing of transfer books, for a limited space of time, for the preparation of an annual statement of the business of the company, and to ascertain the propriety of declaring a dividend and its amount, is in pursuance of a reasonable regulation. The closing of such books does not, in any way, impair the legal rights of a stockholder to share in dividends subsequently declared, although, to some extent, it may embarrass the transfer of stock; *Jones v. T. H. & R. R.R. Co.*, 4-628.

32. **DECLARATION OF.** The declaration of a dividend, from the

profits of a corporation earned and received, constitutes so much a separate fund, the individual property of stockholders. Thenceforth, the corporation owes the stockholder a debt, payment of which, at a proper time, he may demand and, upon refusal, enforce by the aid of a court of equity; *Beers et al. v. Bridgeport Spring Co.*, 6-307.

33. **PAYMENT AFTER DECLARATION OF.** When a dividend is declared there is every essential element of a debt, certain in amount, and if the day of payment be not appointed, it is the duty, at some time, to name such day of payment. The legal effect of declaration of a dividend is that the debt then created is to be paid within a reasonable time. *Id.*

34. **ADVERSE INTERESTS INCIDENT TO.** The interests of stockholders in dividends declared are adverse to each other stockholder and to the corporation, and directors cease to represent the stockholders in relation thereto and can not dispose of, or deal with, the sum so set apart without authority or consent of the stockholders. *Id.*

35. **REPUDIATION OF.** A corporation having declared a dividend, thereby declaring it owes each stockholder a certain sum of money, and has set so much apart from its own funds, can not, thereafter, nullify its vote, or repudiate its obligation, by declining to pay the dividend, or to name a day of payment. *Id.*

36. **STOCKHOLDER NOT RECOGNIZED.** One who claims to be a shareholder in a corporation, but who is not recognized as such by the corporation, and who has elected to treat the refusal of the corporation to recognize him as a conversion of his shares, and has brought an action against it for such conversion, can not, during the pendency of the action, himself, or by his assignee, sue for dividends; *Hughes v. Vermont Copper Mining Co.*, 8-511.

37. —. **Quære**, whether such a claimant can, under any circumstances, maintain an action against the company, for dividends, before he has legally established his right to the shares. *Id.*

38. **DEMAND NECESSARY BEFORE SUIT.** A dividend can not be sued for till after demand. When a national bank attached the shares of a stockholder, for his indebtedness to the bank, and pending this suit, the latter demanded a dividend declared upon the shares, which was refused, and he afterward settled the attachment suit, and, without making any new demand, brought an action for the dividend, it was held that his action could not be maintained; *Hager v. Nat. Bk.*, 5-417.

39. **ACTION TO RECOVER.** After a dividend is declared, each stockholder has a right, in severalty, to his particular proportion; and this right can not be abridged by any discrimination of the directors, in any form whatever. An action may be maintained against the company to pay after demand; *Jones v. T. H. & R. R.R. Co.*, 4-628.

40. **INSTANCE.** Where plaintiff held bonds of defendant company, by their terms convertible into stock, surrendered them and received stock prior to the declaration of a dividend, by the board of directors, the board had no right to limit the payment of the dividend to stockholders holding stock at a day prior to the issue of such stock, which was the close of the fiscal year of the company; but, plaintiff was entitled to the dividend. *Id.*

41. **OPPOSING CLAIMANTS.** A corporation may maintain a bill of interpleader against two opposing claimants of a dividend due on shares of its capital stock, originally held in trust for one of them by a third person, who, in fraud of him, transferred them through mesne conveyances to the other; and upon such a bill, the court may determine to which claimant the dividend pertains, but not the question of the liability of the corporation, to the person defrauded, for permitting the transfer of the shares; *Salisbury Mills v. Townsend et al.*, 4-443.

42. **FORCED LOANS.** The majority of the members of a corporation can not, by withholding the payment of dividends declared, compel the minority to loan the amount of their dividends to the corporation without interest. Wherefore, it is not competent, after dividend declared, that the directors retain the amount to use as working capital; *Beers et al. v. Bridgeport S. Co.*, 6-307.

43. **LIEN UPON DIVIDEND.** A bank may hold a cash dividend as a pledge for an indebtedness of a stockholder to the bank, and a demand by the shareholder for the payment of such dividend, made while the lien continues, is premature; *Hager v. Nat. Bk.*, 5-417.

44. **REFUNDING.** When the charter of a corporation imposes no personal liability on the stockholders, the creditors trust the corporation upon the faith of the capital stock, as the only means of re-payment. They have no right, after the dissolution of the corporation, or when the corporation, at the time dividends were made, was in a prosperous condition and by some calamity has become insolvent, to call upon the stockholders to account for dividends made in good faith, in the regular transaction of the business of the company, from the incomes arising from such business; *Reid et al. v. Eatonton Manuf. Co.*, 3-219.

45. **RESTRAINING PAYMENT OF.** *Semble*, that in a proper case, where a corporation is insolvent and the capital stock, upon the faith of which credit was given, has become insufficient for the payment of the debts of the company, a case might be made where a court of equity would enjoin the payment of future dividends, to the stockholders, until the debts are paid. *Id.*

46. **REFUNDING OF.** There is no question of the right of creditors, in a court of equity, to compel stockholders to refund dividends made to them out of the capital stock itself. *Id.*

47. **JURISDICTION OF EQUITY AS TO.** The proper tribunal will enforce the declaration of a dividend from actual surplus profits

—even contrary to the judgment of directors — and will hold directors accountable, generally, as other trustees. It will, certainly, act to compel the payment of a dividend already declared but unreasonably withheld; *Beers et al. v. Bridgeport S. Co.*, 6-307.

48. TAXATION OF. If a dividend be declared the stock is taxable on the basis of the declaration and the company is estopped by the declaration, whether the dividend be earned or not; *Commonwealth v. Pittsb., Ft. W. & Chi. Ry. Co.*, 5-608.

49. —. A railroad company leased its road, to another corporation, for 999 years at twelve per cent. per annum on its capital. The lessor company increased the number of its shares seventy one per cent. (the par value of both original and increased shares being \$50), on which the stockholders were to receive seven per cent. dividend, being the same amount in money they would have received on their original shares at twelve per cent.; held, this increase was not subject to taxation as a dividend or profits. *Id.*

See TAXATION.

DIVISION OF PROPERTY; see DIRECTORS; DIVIDEND.

DOMICIL; see CORPORATE RESIDENCE.

DONATION.

1. OF STOCK. It is essential to constitute a valid gift — in this case of stock — that there should be a delivery, such as vests, in the donee, control or dominion over the property and, absolutely, divests the donor. So, the delivery must be made with intent to vest the title in donee; *Jackson, exec., v. Street Ry. Co.*, 9-623.

2. RECEIPT OF DONATION ULTRA VIRES. If a corporation, in excess of the power conferred by charter, receives a sum of money, conditioned that it will return it if an additional sum be not raised within a stated period of time and the condition is broken, an action may be maintained against such corporation, on the implied promise to return the money, and a demand for its return may be submitted to arbitration; *Morville v. Amer. Tract Soc.*, 7-473.

3. COLORADO LAW. Under the constitution of the state of Colorado, neither the state, nor any county, city, town, township, or school district, can make any donation, or grant, to, or in aid of, or become a subscriber, or shareholder, in any corporation, or company. Whatever of public benefit may be in the enterprise, no agreement, which is, in fact, a donation, will take the case out of the prohibition; *Col. Cent. R.R. Co. v. Lea et al.*, 6-289.

4. JURISDICTION OF EQUITY. Where property or funds, or both, are donated by the state to a corporation, in trust to carry forward a certain object, and the fund has been put into lands and buildings it does not lose its character as a trust fund, albeit the pro-

perty, so acquired, may be perverted from the use assigned. A court of equity will, in a case of waste, perversion, or inability or indisposition of the trustee to execute the trust, pursue the fund and restore it to its original purpose, into whosoever hand it may have come; unless held by innocent purchasers without notice; *Att'y Gen. v. Ill. Agric. Coll.*, **6-393**.

5. **DONATION TO SEMINARY.** Action on a note, executed as a donation to an incorporated seminary. Plea, consideration wholly failed. The note, upon its face, expressed no condition limiting the gift. The seminary being empowered to receive donations and the note being a donation, it required no consideration to support it, save only the accomplishment of the object in aid of which the money was promised. So, an averment, in abatement, that the fund was to consist of a certain specified sum to be raised, that that amount had not been raised, or subscribed, and that the note was held in trust until such fund should be fully subscribed was held bad in defense; *Roche, adm'r, v. Roanoke Class. Sem.*, **7-81**.

6. **TOWN SITE CORPORATION.** A donation of lots of land by a town site corporation is not, per se, ultra vires. A corporation being formed for the purpose of locating and laying out a town site and improving the same, where the direct and proximate tendency of certain improvements sought to be obtained, by such donation, is the building up of the town and the advancement of the value of the remaining property of the company, such donation is within the powers of the corporation; non obstante, the particular improvements are to be made outside of the limits of the particular town site; *Whetstone v. Ottawa Univ.*, **7-116**.

7. **TO RAILROAD CONTRACT.** If one promise to pay another a sum of money if he will do a particular act, and he does the act, the contract is not devoid of mutuality, and the promisor is liable, though the promisee did not, at the time of the promise, engage to perform the act; for, upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration which relates back and renders the promise obligatory. Wherefore it is held, that if certain subscribers promise and undertake to pay a railroad company a sum, or sums, of money, conditioned that it will construct its road to a designated place, the subsequent completion of the road, according to the terms of the promise, furnishes a consideration, removes the objection of want of mutuality and renders the promise binding upon the subscribers; *Des Moines Valley R.R. Co. v. Graff et al.*, **3-302**.

8. **SUBSCRIPTION NOTES IN HANDS OF TRUSTEES.** Defendants, as a committee of citizens of a town, undertook, in writing, for such citizens, to furnish the right of way, depot grounds, etc., and "to obtain subscriptions" for a railroad company, "in accordance with blank notes already presented by said company for that purpose, to an amount of, at least, \$10,000; provided said company

runs its track through Pella." In accordance with this undertaking, defendants received subscription notes, conditioned to be paid so soon as trains were running from Keokuk to Pella; provided that they were to be void if the said trains were not running on or before the 1st of October, 1864. The road was not so completed until about two and one-half months after the date named. In an equitable proceeding by the company, to require defendants to discover the name of each subscriber and the amount of each subscription, and to deliver the notes over to the corporation, it was held, on demurrer to the petition averring these facts, that complainant was entitled to the relief stated. Defendants are mere trustees to hold the subscription notes, and not entitled to interpose any defense which is purely personal to the individual subscribers and which, perhaps, the makers of the notes may not choose to interpose. *Id.*

9. EVIDENCE OF WAIVER OF CONDITIONS. On the issue whether a corporation, which has received a sum of money on certain conditions, was induced, on an alleged failure to perform the conditions, to enter into an agreement of submission to arbitration by the concealment of material facts, evidence that authority was given by the person demanding the return of the money to the treasurer of the corporation to apply a portion of the money for another purpose; that the corporation itself, at the hearing before the arbitrators, proved such appropriation by its treasurer; and, that the arbitrators allowed the sum so appropriated in reduction of the sum received by the corporation, is insufficient, and is no evidence of the waiver of the conditions subject to which the corporation held the balance of the money; *Morville v. Amer. Tract Soc.*, 7-473.

10. CREDITORS MAY REACH DONATIONS. Where a donation is made to a corporation for a purpose specified, on the personal obligation of one of its corporators to effect that purpose, or return the bonds donated or their value, and he turns them over to the company, which is to indemnify him as against liability, and the bonds donated are used as proposed, and the work is performed so as to relieve the liability to the donor, and stock is issued to several subscribers in respect of such donation, for which they pay nothing, some of which stock they convert into money, the money and stock so received can be reached in equity and applied to the payment of debts incurred by the corporation in performing the work conditioned to be done; *Hickling et al. v. Wilson et al.*, 9-177.

DRAINAGE COMMISSIONERS.

1. CHARACTER OF CORPORATIONS. The drainage commissioners constituted a body corporate by the act of the legislature of Illinois of February 15, 1855, with authority to drain certain wet

lands in Cook county, are a private corporation ; *Hessler v. Drainage Com'rs*, 1-467.

2. **TAXATION.** Such corporation can not levy taxes upon the property of persons who are not members of it. *Id.*

E.

EARNINGS ; see **DIVIDENDS** ; **TAXATION**.

EDUCATIONAL INSTITUTION.

1. **SUBSCRIPTION TO.** An action was brought on a promissory note executed by defendant, to an incorporated seminary, as a donation to an endowment fund. Defendant answered, in abatement of action, admitting the execution of the note, as a subscription to such fund ; but averring that such fund was to consist of a certain specified sum to be raised ; that that amount had not been raised, or subscribed ; and that the delivery of the note was in trust, until such fund should be fully subscribed. This answer was held insufficient ; every delivery of an instrument to an obligee, or payee, or the agent of either, is absolute in law ; *Roche, adm'r etc., v. Roanoke Classical Seminary*, 7-81.

2. **DONATION TO.** In an action upon a note, executed as a donation to an incorporated seminary, defendant pleaded a total want of consideration. The note, upon its face, expressed no conditions limiting the gift. The seminary, being authorized to receive donations, and the note being a donation, it required no consideration to support it save only the accomplishment of the object in aid of which the money was promised. *Id.*

3. **TAXATION.** A seminary was originally located on a tract of eight acres of land, and its buildings were thereon erected. The association afterward acquired other lands, which were within the common inclosure of the seminary grounds, with dividing fences within the common inclosure, and the several tracts were used for the exercise and benefit of the pupils, for vegetable garden and orchard, and all for the exclusive use of the institution. Such lands are exempt from taxation, under a statute exempting the property of institutions of learning. Aliter as to a piece of land not within the inclosure, in the absence of proof as to the manner of its use ; *Monticello F. Sem. v. People*, 10-197.

See **ACADEMY** ; **COLLEGE** ; **UNIVERSITY**.

ELECTION.

1. **ELECTION OF MEMBERS.** The power to elect members is incidental in the corporate body. Such powers need not be expressed in the statute. Where, however, the power is limited, it can not be exceeded ; *Diligent Fire Co. v. Comm.*, 5-613.

2. **A CORPORATE ACT.** The election of a trustee to fill a vacancy is a corporate act, to be exercised in the manner prescribed by the company's charter; *State of Nevada, ex rel., v. Curtis*, 5-509.

3. **GENERAL PRINCIPLE.** When the statute confers upon the stockholders the power to elect directors, the corporation can not deprive them of that right or confer it upon others; *Brewster et al. v. Hartley et al.*, 1-233.

4. **NON CONFLICTING PROVISIONS.** A statutory provision (*Laws, N. Y.*, 1848, ch. 40, § 4) declared that if an election of trustees shall not be made on the day designated by the by-laws of the corporation, it shall be lawful on any other day to hold an election, "in such manner as shall be provided for by the said by-laws," does not conflict with a provision of general law (2 R. S., N. Y., 604, § 8), declaring that, if the election of directors of an incorporated company shall not be duly held on the day designated, "it shall be the duty of the president and directors . . . to notify and cause an election for directors to be held within sixty days;" *People, ex rel. Miller, v. Cummings et al.*, 8-514.

5. **GENERAL RULE.** Where the members of a corporation are directed to be annually elected, the words are only directory and do not take away the power, incident to the corporation, to elect afterward, when the annual day has, by some means free from design or fraud, been passed by; *People, etc., v. Trustees etc.*, 3-253.

6. **ANNUAL ELECTIONS.** Under a law which provides for annual elections of trustees, the trustees being elected to "continue in office for one year, and until their successors shall be elected and qualified," and by which law it is made the duty of the president and board of trustees to give, at least, ten days' notice, before the expiration of their term of office, of the time and place for the election of their successors in office, if they neglect to give such notice, before the expiration of their term of office, they may, lawfully, do so at a subsequent time, as they are still in office. *Id.*

7. **WHEN NOT VACATED.** Non compliance with a statutory provision that officers shall be elected annually and the failure to elect a successor to an officer at the appointed time does not, in the absence of any restrictive provision of the corporate by-laws, vacate the office — in this case that of president. The incumbent in office continues to be such officer *de facto*, at least, so far that service of process on him will bring the corporation into court; *City of Fort Scott v. Schulenberg et al.*, 7-156.

8. **WHO MAY VOTE.** The books and records of a corporation determine who are its stockholders, for the time being, and who have the right to vote on the stock; although the same may have been sold or pledged as collateral security. The party who appears on the books of the corporation, to be the owner, has the right to vote all stock which stands in his name; *State of Connecticut, ex rel., v. Ferris et al.*, 6-312.

9. **NON VOTERS.** A corporation is not obliged to recognize any one as the owner of stock except those shown to be owners by the transfer book, or the act of incorporation; wherefore, one to whom stock has been assigned, with power of attorney attached authorizing a transfer upon the books, but who has not caused the transfer to be made to himself, has no right to vote the stock; *Friedlander v. Slaughter House Co.*, 7-243.

10. **STATE OF LOUISIANA AND CITY OF NEW ORLEANS.** At all elections for directors of the New Orleans, Jackson and Great Northern Railroad Company, the state of Louisiana and the city of New Orleans are entitled to one vote for each share of stock they severally hold in said company; and the result of an election, secured by rejecting such votes, or refusing to count them, is void; *State of Louisiana v. New Orleans, Jackson & Great Northern R.R. Co.*, 1-578.

11. **TURNPIKE COMPANY; ELECTION OF DIRECTORS.** At an election for directors of a turnpike company organized under the general law of the state of Indiana of May 12, 1862, or of one which has abandoned a special charter under which it was originally organized, and has adopted the general law, each stockholder is entitled to one vote for each share owned or held by him for ten days previous to such election, notwithstanding a by-law adopted by the directors of the company, limiting to a certain number the votes to be cast by any one stockholder at an election for directors; *Beckett et al. v. Houston et al.*, 1-379.

12. **ILLEGAL ELECTION.** Where the majority of a congregation, pretending, contrary to the fact, that some of the trustees had resigned and refused to act, proceed to elect others in their stead, without notice to the minority of the association, and the persons so elected proceed to act and exclude the minority from the use and enjoyment of the church property, the remedy as to the illegal election is by quo warranto; *Nelson et al. v. Benson et al.*, 5-231.

13. **RIGHT TO ENFORCE LAWFUL.** Directors of a corporation who are in office, can not dispute the right of a stockholder to have a new election of directors held in accordance with the by-laws, on the ground that the stockholder purchased his stock with the money of rival companies and intends to use his legal rights as the holder of a majority of the capital stock, for purposes detrimental to the interests of the corporation and that the proposed election of directors is a step toward the illegal control of the property and business of the corporation; *Camden & Atlantic R.R. Co. v. Elkins*, 9-575.

14. **INJUNCTION BILL DISMISSED.** An interlocutory order for an injunction was granted, forbidding directors of a corporation from hindering a new election of directors. The appeal was unanimously dismissed, such appeal having been taken after the day for election had passed, and appellants having adequate

relief, by summary proceedings, in the supreme court, to set aside the election if illegal. *Id.*

15. STOCK HELD AS PLEDGE. When the statute under which a corporation is organized provides that the directors shall be elected by the stockholders, it can not confer upon a trustee, holding stock as a pledge, the right to vote at an election of such officers; *State v. Curtis*, 1-233.

16. —. Stock owned by a corporation, even when held by a trustee, can not be voted upon by any person. *Id.*

17. RIGHT OF PLEDGOR OF STOCK. A person who pledges stock has the right to vote upon it until the title of the pledgee to the stock is perfected, unless there be an agreement to the contrary; *Hoppin et al. v. Buffum et al.*, 4-151.

18. VOTE ON STOCK IN PLEDGE. The pledgor of stock which stands on the books of a corporation in the name of the pledgee, may, by proceeding in equity, compel a transfer to him or oblige the pledgee to give him a proxy to vote; but, where the pledgor acquiesces, for years, in the control of the stock by the record owner, the pledgee, and makes no attempt to inform the corporation of the true state of facts until a contested election occurs, and then not until the votes are being or have been counted, it is too late to ask the interference of a court with the result of such election as declared. *Id.*

19. NOTICE. When the certificate book of a corporation shows that stock is held by a trustee, the officers of the corporation are charged with notice that he does not hold the stock in his own right; *State v. Curtis*, 1-233.

20. RIGHT OF TRUSTEE. If the stock stands upon the books of a corporation in the name of a trustee as such, he is the proper person to vote upon it, until the equitable owner, if such there be, shall seasonably assert his right to have the power of voting transferred to him; *Hoppin v. Buffum*, 4-151.

21. OF TRUSTEES. By statute, of California, a majority of the stock must be represented at an election of trustees of a mining corporation. If such majority be made to appear present by the illegal voting of stock, the election is void; *Stewart et al. v. Mahony Mining Co. et al.*, 6-258.

22. BANKRUPTCY OF STOCKHOLDER. That one had been declared a bankrupt and his estate vested in an assignee in bankruptcy, would not affect his right to vote stock which stood in his name, not having been formally transferred. In this case the rule applied with greater force, for the reason the assignee assented to the bankrupt's voting the stock; *State, etc., v. Ferris et al.*, 6-312.

23. ILLEGALLY ISSUED. Certificates of stock issued to a creditor of a corporation, or to a trustee for him, as a security for his debt, are in California illegally issued, and can not be voted by any person; *Brewster et al. v. Hartley et al.*, 1-233.

24. ELECTION; CERTIFICATE OF STOCK. A certificate of stock

owned by a stockholder in a corporation is not essential to his right to vote at an election of directors ; *Beckett et al. v. Houston et al.*, **1**-379.

25. FRAUDULENT TRANSFER OF STOCK. When stock of a corporation is transferred, without consideration, for the purpose of fraudulently controlling an election, a proper remedy is by injunction to prevent the transferees from voting ; *Webb et al. v. Ridgely et al.*, **5**-421.

26. ILLEGAL VOTES. By the civil code of California (§ 312), no person is competent to vote at a corporate meeting save he be a member of the corporation or a bona fide stockholder, or the lawful representative of such. One in whose name, as trustee, stock stands on the books of the company, but without authority of the owners of the stock and who has not the consent of the owners thereof to vote it, is neither ; and is not qualified to vote the stock ; *Stewart et al. v. Mahony M'g Co.*, **6**-258.

27. ELECTION ILLEGAL. The by-laws of a corporation provided that the president, when present, should preside at all meetings of stockholders and trustees, and, if absent, a president pro tempore should be elected. At a meeting of all the stockholders of the association, where a portion only of those present participated, where the president, being present, did not preside, and no president pro tempore was appointed, there was no one competent to receive ballots or declare the result of a vote : wherefore, there was no legal election ; *State of Nevada, ex rel., v. Pettinelli et al.*, **5**-516.

28. SUBSEQUENT LEGISLATION. The charter of a corporation and a subsequent statute, the latter subjecting, so far as the same should be applicable, all corporations theretofore organized, to its provisions, both provided that at all corporate elections, each stockholder should be entitled to as many votes as he owned shares ; the charter, however, limited each shareholder to twenty votes, there being no such limitation in the statute. There was no repeal of the limitation ; *Webb v. Ridgely*, **5**-421.

29. MANDAMUS TO ENFORCE. In case the proper officers of a manufacturing company refuse to perform the duty imposed upon them, to call an election for directors, a stockholder has a remedy, by mandamus, to compel such performance ; *People, ex rel. Miller, v. Cummings et al.*, **8**-514.

30. —. Mandamus may issue on petition of a corporation against persons claiming to hold its offices, by virtue of an election, at which illegal votes were cast, by means whereof a minority of the stockholders have usurped the power of control ; *Amer. Ry. Frog Co. v. Haven et al.*, **3**-418.

31. —. When a board of president and trustees, elected for one year and until their successors shall be elected and qualified, has neglected to give notice, for an annual election of their successors, as required by law, within the year for which they were

elected, and refuse to do so afterward, mandamus will issue to compel the calling of such election; *People v. Trustees etc.*, **3-253**.

32. MANDAMUS TO ENFORCE. By statute (Nevada) the first annual meeting of an incorporated company was required to be held six months after the recording of the certificate of incorporation, at which meeting trustees to take the place of those named in the articles of association were to be elected. No such meeting having been called, by the trustees in office, and demand having been made by relator, that it be called and refusal having been given, mandamus should issue directing that the meeting for the election of trustees be called according to law; *State, etc., v. Board of Trustees*, **3-549**.

33. QUO WARRANTO. A contested election of directors was decided by votes cast on shares owned by two persons who had pledged such shares to another, as security for an indebtedness. The stock stood, on the books of the company — and always had done so — in the name of pledgee, as trustee. Pledgee had always voted the stock without objection until the meeting at which the contested election was held. He so voted it at that election, no objection being made until the votes were being, or had been counted. Quo warranto will not lie as to the election of the officers; *Hoppin v. Buffum*, **4-151**.

34. INDUCTION INTO OFFICE. Persons who, at an election of directors, receive only a minority of the votes received by the inspectors, can not, by quo warranto, be declared elected and inducted into office, although it be made to appear that legal votes sufficient to have made up a majority in their favor were tendered and improperly rejected by the judges of the election; *State, etc., v. M'Daniel et al.*, **4-20**.

35. JURISDICTION OF EQUITY. Equity has no jurisdiction to determine the validity of an election of directors, of a private corporation, or the right of directors elected to hold and exercise the office of directors. It follows it can grant no relief that is merely incidental to that power; *Owen et al. v. Whitaker et al.*, **3-596**.

36. REVIEW OF. At an election of directors of an incorporate benevolent association, votes by proxy were received under a by-law adopted at that meeting. The only objection made was as to the right to vote by proxy. On quo warranto to try title of the directors declared elected to office, held, in absence of objection made at the time of the election, to the form, execution or validity of the proxies, which were received and acted upon, it is to be presumed that they were regular and proper in these respects; *People, ex rel., v. Crossley et al.*, **5-240**.

37. CONSTITUTIONAL LAW. The constitution of Illinois declares that general elections shall be held biennially, "on the Tuesday after the first Monday in November, until otherwise provided by

law." Held, that the legislature, in the exercise of the power thus conferred, may provide for general elections in November of each year; *People v. Gaines & Garner et al.*, 2-154.

38. FAILURE OF OFFICER TO RECORD ORDER FOR AN ELECTION. When the court having power to order an election exercises it, an election held in accordance with the order will not fail because of an omission of the clerk to make a record of the order, unless a record is made by law essential to the validity of the election. *Id.*

39. WHOLE NUMBER OF VOTES IN THE COUNTY. The number of votes cast at an election is prima facie evidence, not only of the result of the election, but of the number of legal votes in the county. *Id.*

40. REGISTRY LISTS. The registry list prepared for a preceding election is not sufficient to rebut the presumption that the votes cast at an election embrace all the votes that could be cast by the legal voters of the county. *Id.*

41. EFFECT OF TWO ELECTIONS UPON ONE PROPOSITION. A proposition to adopt for a county the system of township organization, was voted upon by the people of a county, at the November election, 1869. The result was declared in favor of the adoption of the proposition, and the commissioners to effect the organization were appointed, as required by law, but no further steps were taken. The same proposition was again submitted and voted upon in 1865, with a like declared result. Commissioners were again appointed and the organization perfected. If the proceedings under the first election were operative and valid, when the second election was held they were not rendered invalid by such election, and they were sufficient to sustain the organization; if the first election and the power conferred by it had become inoperative, the proceedings were warranted by the second election. *Id.*

42. TOWN OFFICER. The provisions of the general statutes of Massachusetts, that polls shall not be kept open after sunset, does not apply to the election of town officers. *Conlin v. Aldrich et al.*, 2-461.

43. ELECTIONS BEFORE ORGANIZATION ILLEGAL. Under an agreement of stockholders of a state bank, authorizing the conversion of such bank into a national bank, the stockholders proceeded to appoint directors of the, to be, national bank. This was not a legal election of directors; such election could not be had until organization; *Lockwood v. Mechanics National Bank*, 4-140.

44. QUALIFICATION — NOT STOCKHOLDERS. Where the statute of a state providing for the organization of a corporation does not require its directors to be stockholders of the association, the discretion of the stockholders in electing directors is not limited to persons holding stock; *State, ex rel. Attorney General, v. M'Daniel et al.*, 4-20.

45. **RETIRED.** Where a director of a corporation sold out his stock and ceased, thereafter, to take any part in the management of its affairs, or in the meetings of its directors, he was not bound to see that a successor was elected in his place, or to tender a formal resignation, and he was not responsible for the acts of those in its management at the time of its dissolution, some five years after he had thus severed his connection, although no successors to the directors then in office were ever elected; *Sturges, adm. etc., v. Vanderbilt*, impleaded, 8-523.

46. **HOLDING OVER.** The acts of a board of directors, of a corporation, elected under charter authority to act until the end of a day certain, when its successors would assume the powers of the office, after the expiration of the term for which they are appointed, are valid, as to persons not being the state or stockholders of the company; *Thorington v. Gould*, 6-147.

ELEEMOSYNARY CORPORATION; see **COLLEGE**.

EMBEZZLEMENT.

1. **NON COMPLIANCE WITH STATUTE.** Indictment charging an agent of a foreign insurance company with embezzlement. He can not defend by showing a non compliance with a statute requiring the person who assumes to act as the agent of such a company to procure and record a certificate, from the auditor of state, showing that he is entitled to carry on the business of the corporation and had, therefore, received the moneys, charged to have been embezzled, on an illegal consideration, and in the transaction of an unlawful business; *State v. Tumey*, 9-234.

EMINENT DOMAIN.

1. **WHAT MAY BE TAKEN.** The franchise of a corporation may be taken for public use upon making compensation, and no exemption arises from the fact of the ownership and use of the property by a corporate body; *N. Y. Cent. & Hud. R. R.R. v. Metropolitan Gas Light Co.*, 5-573.

2. —. Lands of a corporation, not in present use or at present indispensable for the purposes of its organization, are not necessarily exempt from condemnation because, in the future, such use may be deemed essential to the conduct of its public business. *Id.*

3. —. The fact that property sought to be taken for a public street, by a town authorized to do so, belongs to a corporation, which acquired its title by the exercise of the right of eminent domain, does not affect the right to take it. There can be no distinction in the exercise of this right between the property of individuals and of chartered corporations, nor between rights acquired to land by a corporation and title held by the citizen under letters patent from the government. The same great law of pub-

lic necessity applies to all; *Chicago, R. I. & Pac. R.R. Co. et al. v. Town of Lake et al.*, 5-272.

4. **WHAT ESTATE MAY BE TAKEN.** An act is not unconstitutional because it enacts that the party empowered to exercise the power shall acquire an absolute estate in fee-simple; *Cotton v. Miss. & B. R. B. Co.*, 7-603.

5. **EXTENT OF THE POWER.** The only limit to the grant of power to exercise the right of eminent domain is the reasonable necessity of the grantee thereof in the discharge of its duty to the public, but then an evident and apparent occasion or necessity for the property must be shown, and the purposes for which the property is to be taken must be strictly within the charter grant; *N. Y. Cent. & Hud. R. R.R. v. Metropolitan Gas Light Co.*, 5-573.

6. **MODE OF EXERCISE WITHIN LEGISLATIVE DISCRETION.** In the absence of any provision of organic law, prescribing a contrary mode of exercising the right of eminent domain, the mode is within the discretion of the legislature. *Id.*

7. **A LIMIT OF TAKING.** Authority of one railroad company to take, by condemnation, the franchise of another, which could be a link in a through or connected route, would be an extreme case, demandable by no apparent public exigency, which it would be the duty of the courts to declare to be the taking of private property for private use; *Black et al. v. Delaware & Raritan Canal Co. et al.*, 5-547.

8. **LEGISLATIVE AUTHORITY.** In the exercise of the right of eminent domain, the legislature may authorize shares in corporations and corporate franchises to be taken for public uses, upon just compensation. *Id.*

9. **GENERAL AUTHORITY.** General authority to a railroad company, to condemn a site for its road, will not authorize the condemnation of a highway already constructed by authority of law, running longitudinally therewith. In the absence of evidence tending to show a necessity for such appropriation an abandonment, by the road corporation, to a railroad, will be presumed voluntary and without the assent of the state; *Kenton County Court v. Bank Lick Turnpike Co.*, 5-395.

10. **POWER TO TAKE UNDER, NOT IMPLIED.** A legislative intent to subject lands already devoted to a public use to uses which might thereafter arise, will not be implied from a grant of power, made in general terms, without having in view a then existing and particular need for the subsequent use, at least, where both uses can not stand together and the latter, if exercised, must supersede the former; *Application of City of Buffalo*, 8-480.

11. **THE USE A JUDICIAL QUESTION.** The question whether the use for which private property is sought to be taken, under and by the exercise of the power of eminent domain, is public or private, is a judicial one, to be determined by the court. The

grant by the legislature of the right to take is not conclusive evidence that the use is a public one; *Petition of Deansville Cemetery Assoc.*, 8-470.

12. **PRESUMPTION OF PUBLIC NECESSITY.** Private property can be taken only when the public necessity requires it, but if the legislature authorize the exercise of the right, by its charter, without a declaration of such necessity, the presumption is raised that in the opinion of the law maker the necessity has arisen; *Black et al. v. Delaware & Raritan Canal Co. et al.*, 5-547.

13. **WHAT IS A PUBLIC USE.** Whether workshops for repairing and safely keeping the cars and locomotives of a railroad, are necessary appendages to a railroad, and whether land sought to be condemned as a site, for such workshops, is really needed for that purpose, are questions of fact, on which issues may be joined to be decided at the trial; *Southern Pac. R.R. Co. v. Raymond et al.*, 6-244.

14. **PUBLIC USE.** The construction of depots, engine houses and repair shops, for the accommodation of the freight and passengers of a railroad corporation is a public use, for which the land of a private person may be taken, by the exercise of the power of eminent domain; *Hannibal & St. Joe R.R. Co. v. Muder*, 4-506.

15. **WHAT IS A PUBLIC USE.** The taking of private property, in order that a railroad may be made, belongs to the class of things which, in proper cases, is to be regarded as public necessities; *Secombe v. R.R. Co.*, 5-108.

16. **PUBLIC USES.** Depots and cattle yards, sufficient to accommodate freight and live stock transported by a railroad corporation are essential to its discharge of its public duty; wherefore, lands for such uses, as well as for safe approaches thereto may be acquired by proceedings in invitum; *N. Y. Cent. & H. R. R.R. v. Metropolitan Gas Light Co.*, 5-573.

17. —. If the use for which private property is proposed to be taken is public, or if it be so doubtful that the courts can not pronounce it not to be such as to justify the compulsory taking, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive; *Chi., R. I. & P. R.R. Co. et al. v. Town of Lake et al.*, 5-272.

18. **PRIOR USE.** In determining whether a power to take lands, given in general terms, was meant to have operation upon lands already devoted, by legislative authority, to a public purpose, it is proper to consider the nature of the prior use and the extent to which it will be impaired or diminished by the taking for the subsequent use; *Application of City of Buffalo*, 8-480.

19. **CORPORATE PROPERTY.** The legislature may interfere with property held by a corporation for one public use and apply it to another, and may delegate the power so to do to another corpora-

tion ; but, such delegation of power must be in express terms or must arise from necessary implication. *Id.*

20. **INSTANCE.** Under power given by the charter of the city of Buffalo to take lands for canals, basins, slips and other corporate purposes, the common council instituted proceedings for the purpose of acquiring a strip of land, sixty feet wide and about two miles long, through which to extend a canal. Portions of the lands sought to be taken for that purpose had already been acquired by various railroad corporations for the purposes of their roads. The line of the extension passed through the yards of one of the corporations at a point where there were numerous tracks with switches and turn outs. It intersected other tracks, some of them the main tracks, others leading to yards, freight depots, etc., all in constant use and indispensably necessary for the business of the corporations. By the charter, the city acquires a fee to land taken under its provisions. No provision was made, in the proceedings, reserving the right, to the railroad corporations, to bridge the canal, or in any way to use the lands after the city had acquired title. It was held, that no power to take such lands was given to the city by its charter, either expressly or by necessary implication. *Id.*

21. **NECESSITY OF EXERCISING THE RIGHT, CAN NOT BE INQUIRED INTO BY THE COURTS.** Courts have the right to determine whether the use private property proposed to be taken and appropriated to is public in its nature or not ; but, when the use is public, the judiciary can not inquire into the necessity or propriety of exercising the right of eminent domain ; that right is political in its nature, and to determine when it shall be exercised belongs exclusively to the legislative branch of the government ; *Chicago, R. I. & P. R.R. Co. et al. v. Town of Lake et al.*, 5-272.

22. **DISCRETION OF GRANTEE OF POWER.** A corporation to which is delegated the power to appropriate property by eminent domain has, to a large extent, the right to determine the extent of its wants and to fix upon the location of land to be appropriated subject to the purposes for which such land is to be taken. With the exercise of such discretion courts will not interfere, unless the selection will result in great injury or has been influenced by some improper motive ; *N. Y. Cent. & H. R. R.R. Co. v. Metropolitan Gas Light Co.*, 5-573.

23. **EXERCISE OF RIGHT BY MUNICIPAL CORPORATION.** Municipal corporations, under their general authority to lay out highways, can not take land, for a parallel highway previously taken and occupied by a railroad company, under and pursuant to its special grant. The presumption is there is no necessity so urgent as to require it. They may, however, lay out highways across a railroad, because thereby the railroad company is not dispossessed, and such being a more urgent and constantly occurring necessity, it

must be presumed to have been contemplated by the parties to the grant; *City of Bridgeport v. N. Y. & N. H. R.R. Co.*, **3**-189.

24. **FOREIGN CORPORATION.** By statute of Iowa (Revision, § 1314) proceedings for the condemnation of lands for the use of railroad right of way can be instituted only by or against corporations in the state organized under its laws. A foreign corporation can neither exercise the power of expropriation nor enjoy the results if acquired; *Holbert v. St. L., K. C. & Neb. R.R. Co.*, **6**-531.

25. **CONSTITUTIONAL LAW.** Under the constitution of Illinois, private property may be taken for public use when authorized by a law duly passed, and compensation paid; but the use for which it is taken must be essentially public; *City of East St. Louis v. St. John*, **2**-169.

26. **FOR SPECIFIC PURPOSE.** A municipal corporation has not the power to condemn private property to a public use not specifically named in the law authorizing the condemnation, and which is not within the scope and meaning of the delegated authority. *Id.*

27. **RULE APPLIED.** So, where the charter of East St. Louis confers authority on the city, to take private property for opening, altering and laying out any street, lane, avenue, alley, public square, or other public grounds, such delegated authority does not confer the authority to condemn property, on which to erect a city prison. *Id.*

28. **CONDITION PRECEDENT TO EXERCISING RIGHT.** Although a railroad corporation is authorized to appropriate lands, by the exercise of the right of eminent domain, delegated to it by the legislature, the court must determine as to the necessity and extent of such appropriation. The necessity must exist, as a condition precedent to the exercise of the right, and the power to determine whether such necessity exists has not been delegated to the board of directors of the company; *Rensselaer & Saratoga R.R. Co. v. Davis et al.*, **3**-617.

29. **AS TO PROPERTY NOT NECESSARY.** The acquisition of lands for the purpose of speculation, or sale, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises remotely connected with the running or operating of a railroad, although they may increase its revenue and business, are not such purposes as authorize the exercise of the power to condemn property. *Id.*

30. **EXHAUSTION OF POWER.** When a discretion to take land not exceeding a certain measure is given to a railroad company, and they exercise such discretion and take such land as they want, and finish their road upon that basis, the power of taking land under the grant is exhausted. But, the principle involved in such cases does not apply to case stated, for the reason that since the power to widen the road was given it never has been used; *Childs et al. v. Central R.R. Co.*, **3**-568.

31. **TO WIDEN A RAILROAD.** An original charter, given in 1831, empowered a railway company to take a strip of land, not exceeding sixty-six feet wide, for the construction of their road. They, however, took a strip only thirty-three feet wide and constructed their road upon it; afterward, under another act, another company was enabled to and did purchase the road of the former company. Under this enabling act it was provided that the road so purchased should become a part of the road authorized to be constructed by the former company, "and in its further construction and completion, maintenance, use and enjoyment should be regulated and governed by the provisions of the charter of the last named company." By the charter of the purchasing company authority was given to acquire by condemnation, if necessary, a line of land for their road not exceeding one hundred feet wide. Held, that this provision applied to that part of the road purchased, and that until the road was actually widened, the power given could not be said to have been exercised. *Id.*

32. **POWER NOT CONFINED TO TAKING FOR RIGHT OF WAY.** The taking, for boom purposes, of land bordering on the Mississippi river may be a taking for public use. Section 4, article 10, of the constitution of the state of Minnesota, declaring that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," does not confine the exercise of the eminent domain to a taking for a right of way; *Cotton v. Miss. & Rum River Boom Co.*, 7-603.

33. **EFFECT OF LEASE OF RAILROAD.** A lease by a railroad corporation of its road for a term to another railroad corporation, does not vest in the assignee any power to exercise the right of eminent domain. This power remains in the original corporation and the legislature might properly deal with it exclusively in amending its charter; *Mayor and aldermen of Worcester et al. v. Norwich & Worcester R.R. Co. et al.*, 4-438.

34. **ACQUISITION OF LANDS.** Under various acts of assembly of Pennsylvania the Delaware and Hudson Canal Company constructed its works. At a later day, under color of its charter, the company enlarged those works. In an action on the case, to recover damages for taking the land and for wrongfully and negligently erecting, keeping and continuing a certain dam and causeway across a stream, as a part of such enlargement, causing water to set back into the mill race and upon the water wheel of plaintiff's saw mill, whereby his land was caused to be unproductive and his water power and mill privilege worthless, it was held, that the power of an incorporated company to enlarge its works can not be questioned by the plaintiff in such an action, the company having acted under color of its charter. Only the state can inquire into the exercise of the powers of the corporation and the state may waive any excess or breach of conditions, express or

implied, on the part of the corporation; *Farnham v. Delaware & Hudson Canal Co.*, 4-84.

35. ASSESSMENT OF DAMAGES. By the act of incorporation, if lands were to be taken outside the location of the canal, application should be made to the county commissioners for assessment of damages, but this requirement was not necessary for the taking of lands within the location; *Briggs v. Cape Cod Ship Canal Co.*, 10-568.

36. COLLATERAL BENEFITS. It does not constitute any valid objection to a proposed improvement, or render it any less a public necessity, because, perchance, it might confer benefits and advantages upon business arising from structures which are really essential to the successful operation of a company's enterprise, but which, of themselves, would not authorize the appropriation of land to insure their construction within the rules applicable to the exercise of the right of eminent domain; *N. Y. Cent., etc., Co. v. Metrop. G. L. Co.*, 5-573.

37. PAYMENT OF DAMAGES. An injunction will issue to restrain the use and occupancy of land, by a corporation which has not paid damages awarded; *Holbert v. St. Louis, Kansas Central & Nebraska R.R. Co.*, 9-531.

38. —. Where a foreign corporation is using, by sufferance, the way of a domestic corporation, an injunction will issue to restrain such use until just compensation has been made by the owner or the party using. *Id.*

39. DEPOSIT OF BONDS IN PLACE OF MONEY. Where the act of incorporation required the corporation to deposit with the state treasurer \$200,000 before it could condemn lands for corporate use, a deposit of United States bonds of the par value of \$200,000 is a sufficient compliance with the act; *Briggs v. Cape Cod Ship Canal Co.*, 10-568.

40. IMPEACHMENT OF AWARD. A judgment of condemnation rendered by a competent court, charged with a special statutory jurisdiction and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment, in a collateral proceeding, than the judgment of any other court of competent jurisdiction; *Secombe v. R.R. Co.*, 5-108.

41. SPECIAL REMEDY. A special remedy given to a railroad company for the condemnation of real estate, may be repealed by a general act affecting all railroads. It is no element of the contract of the charter; *Chattaroi R.R. Co. v. Kinnear*, 10-445.

42. JURISDICTION TO RESTRAIN EXERCISE OF RIGHT. Where a railroad corporation instituted proceedings to condemn and appropriate, for its road, the right of way and track of another railroad company, but concealed the object and purpose of the proceeding, did not describe the land as such, and did not give notice to the latter company of the pendency of the proceeding, and the

whole proceeding, considered in the light of surrounding circumstances, appeared to be in execution of a scheme for obtaining possession of such company's road without making compensation, it was held, that a court of equity would restrain the taking of possession under such fraudulent proceedings; *Cincinnati, L. F. & Chic. R.R. Co. v. Danville & V. R.R. Co.*, 5-326.

EQUITY.

1. JURISDICTION. The jurisdiction which courts of equity exercise over individuals extends equally to acts done, or omitted to be done, by corporations; *Cushman v. Thayer Manuf. Jewelry Co.*, 8-569.

2. —. A court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their actions, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief; *Pond v. Framington & L. R.R. Co.*, 7-530.

3. —. A bill in equity, by creditors of a railroad corporation, alleged that the corporation was insolvent; that all its property was mortgaged to trustees for the benefit of one class of creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for a long term of years, at a rental which would not pay the interest of its indebtedness; and, that the execution of the lease would be injurious to the interest of its creditors and stockholders. The prayer was for an injunction, to restrain the corporation from further prosecuting its business and for the appointment of a receiver. The court held the bill did not state a case within the equity jurisdiction of the court. *Id.*

4. SUPERVISION OF EQUITY. A court of chancery can not assume or vest in a receiver the management and control of corporate business, except under proceedings instituted to wind up the corporation; *People, ex rel., v. Judge of St. Clair Circuit*, 5-478.

5. JURISDICTION OF. The object of a corporation was to establish and maintain a high school. To the corporation was delegated power "to receive and hold, for the benefit of said high school, any lands, tenements etc. . . . by gift, devise, donation, contract or purchase." A stockholder exhibited his petition in equity to enjoin the collection of a part of his subscription to the stock, not in judgment, for that the corporation had purchased, or was about to purchase, a certain house and lands, for which, he claimed, it was unable to pay, and the result of which purchase, if consummated, must be the bankruptcy of the corporation. This did not show a sufficient cause of action. It is by no means true that a court of equity has the power to interfere, by injunction, to prevent a corporation from executing a contract it has a lawful right to make; *Dudley v. Kentucky High School*, 5-382.

6. INTERFERENCE IN MANAGEMENT OF CORPORATION. In the absence of a statute, it is well settled, that courts of equity can not interfere with the action of such officers as have been placed by the corporation itself in the control of its affairs, unless in cases of excess of their discretion or in aggravated cases of misconduct amounting to actual or constructive fraud; *Cicotte v. Anciaux*, 10-629.

7. JURISDICTION AS TO RIGHT IN ANOTHER STATE. A court of equity in this state has jurisdiction to enjoin the defendants from interfering with the right of way claimed by the complainants over lands in another state, where the defendants are personally served. The jurisdiction in equity by way of injunction is strictly in personam; *Alexander v. Tolleston Club*, 10-215.

8. PRACTICE — OBJECTIONS TO ANSWER. No question can be raised by demurrer to an answer in chancery; if the answer is defective it must be excepted to, and when the answer is not under oath, exceptions will not lie, because such answer is not evidence for the party making it; *Brown v. Scottish American Mortgage Co.*, 10-233.

9. AS TO DISCRETIONARY ACTS. Courts of equity will rarely interfere with the exercise of discretionary power by corporate bodies, or their officers to whom such powers are confided. Wherefore, an injunction is not properly allowed to restrain the mere allowance of a fraudulent account, at least, unless it be made to appear that irreparable damage would result, to complainants, by the allowance of the account. It would seem that such allowance would conclude no one; *Rogers et al. v. Lafayette Agric. Works et al.*, 7-67.

10. REDRESS WHERE CORPORATE INTERESTS ENDANGERED. The primary redress where the interests of a corporation are suffering, or are likely to suffer, is within the body, first by appeal to the directory and then to the stockholders. There may be cases, where an appeal to the directory would be fruitless and delay extremely dangerous, in which chancery will interfere; but, it should be a strong case to justify such interference in the first instance — not merely a case of mere divergence of judgment as to a matter of policy; *Tuscaloosa Manuf. Co. et al. v. Cox et al.*, 9-1.

11. INSTANCE. The bill in this case was filed by three stockholders in a private manufacturing corporation, two of them being directors, against four other directors who composed the executive committee, charging that one of said committee, who was also treasurer and general financial manager of the business, under the superintendence of the committee, was allowed to purchase all supplies from a mercantile firm, of which he was an active member, at prices largely in excess of market rates, whereby he was enriching said partnership at the expense of the corporation, reducing its dividends and depressing the value of its stock. It prayed the removal of the treasurer and agent and a settlement

of his accounts. No charge of fraud or bad faith was made on the part of the other members of the committee, and there was no allegation that redress had been sought within the corporation. The bill was held to be without equity, and an injunction granted, on its being filed, was dissolved. *Id.*

12. CEMETERY; INVASION. A court of equity may restrain invasion and quiet the possession of grounds appropriated by a church organization to the purposes of a cemetery. In a proper case it will restrain town authorities, who have assumed, in virtue of an alleged plat and dedication, to open a highway through such grounds; Trustees etc. *v.* Walsh et al., **3**-280.

13. DEED; MISTAKE IN. Equity will reform a deed of trust to the agreement of the parties. Wherefore, when such a deed was executed by the proper officers of a corporation, but, by mistake of the scrivener, it was made to appear to be the deed of those officers, as individuals, the court ordered its reformation; West et al. *v.* Madison Co. Agric. Board, **6**-374.

14. DIRECTORS' VOTE. Mere irregularity in the vote of directors — as that one voted by proxy — does not warrant the interference of equity to prevent the consummation of a resolution; Dudley *v.* Ky. High Sch., **5**-382.

15. DISSOLUTION. Where a right is sought to be enforced against a corporation, and the relief asked will only affect the stockholders, as such, and no discovery or relief is sought against them, as individuals, such stockholders are not necessary parties to a bill for dissolution of the corporation; Ward *v.* Farwell et al., **6**-490.

16. DIVIDEND. A court of equity will enforce the payment of a dividend, at the suit of a stockholder, after such dividend has been declared; Beers et al. *v.* Bridgeport Spring Co., **6**-307.

17. —. Semble, that where a corporation is insolvent and the capital stock has become insufficient for the payment of the debts of the company, a case might be made where a court of equity would enjoin the payment of future dividends to the stockholders, until the debts are paid; Reid et al. *v.* Eatonton Manuf. Co., **3**-219.

18. —. There is no question as to the right of creditors, in equity, to compel stockholders to refund dividends made to them out of the capital stock itself. *Id.*

19. ELECTIONS. A court of chancery has no jurisdiction to determine the validity of an election of directors of a private corporation, or the right of the directors elected to hold and exercise the office of directors; and, therefore, it can grant no relief that is merely incidental to that power, such as to restrain defendants from acting as directors; Owen et al. *v.* Whitaker et al., **3**-596.

20. —. When stock of a corporation is transferred, without consideration, for the purpose of fraudulently controlling an elec-

tion, a proper remedy is by injunction, to prevent transferee from voting; *Webb et al. v. Ridgely et al.*, **5-421**.

21. **EXPULSION OF MEMBERS.** A court of equity will not entertain a bill of a member of a private corporation against such corporation, to restrain the expulsion of such member for a violation of its by-laws and rules; *Sturges v. Bd. of Trade*, **6-401**.

22. **FRAUD.** Equity will take jurisdiction of a bill which charges the directors of a corporation with having negligently and fraudulently applied funds of the company to purposes other than the payment of the debts of the company, by distributing such funds to themselves and stockholders; *Lyman v. Bonney et al.*, **7-445**.

23. **INJUNCTION.** Where the injury to the complainant is of that nature that, while there may be a remedy at law, as by recovery of damages, yet it can not be adequately relieved, by suit for damages, for the reason that it is of continuous occurrence and will require the continued and repeated suits and litigation, a preliminary injunction will be issued to restrain it; *Rogers Locomotive etc. Works v. Erie Ry. et al.*, **3-599**.

24. —. A preliminary injunction will not be granted to compel a common carrier to transport goods at the rates fixed by law, but it will issue to restrain the party complained of from entering into any agreement, or doing any thing, to prevent or hinder a railway company, bound by law to transport goods, from performing its duty as to such transportation. *Id.*

25. —. Equity will not reach out, by injunction, at the suit of a foreign corporation, which has not complied with the state law and has no property interests in the state, to enjoin another corporation from obstructing it in proceedings tending toward its doing business; *Am. Un. Tel. Co. v. W. Un. Tel. Co.*, **6-186**.

26. **INSOLVENCY.** Equity will compel the payment of such proportion of stock of the company subscribed, which is unpaid, for the purpose of paying the debts of an insolvent corporation; *Dalton & Morgantown R.R. Co. v. M'Daniel et al.*, **6-345**.

27. —. A bill in equity may be maintained by an assignee of an insolvent corporation, against one who holds assets of the company, under a contract fraudulent and void as to creditors, when the bill seeks to have the contract annulled and the consideration restored; *Taylor et al. v. Taylor*, **9-382**.

28. **INSURANCE.** A preliminary contract for insurance, if valid, may be enforced in equity, against the insurer; *Ins. Co. v. Colt*, **5-74**.

29. **MORTGAGE.** A bill in equity may be maintained by the owner of a promissory note and a mortgage securing it, to restrain a sale of the property covered by the mortgage, and to compel the surrender of the note and mortgage by a person claiming to hold them under a transfer fraudulently made to him by an agent of the owner; *Holden et al. v. Hoyt et al.*, **9-453**.

30. **MORTGAGE.** Usury in a debt secured by mortgage. The party complaining of the usury must proceed in equity by bill to redeem; *Kelly v. Mo. Build'g & L. Ass'n*, 6-180.

31. **PERSONAL LIABILITY.** In Massachusetts an action at law does not lie against corporate officers to enforce liability to the extent of their stock, for debts. The remedy is in equity; *M'Rae v. Locke et al.*, 5-454.

32. —. A statute provision that the stockholders of a corporation are liable for all debts due at the time of its dissolution, to the extent of their stock, creates a primary and absolute liability on the part of the stockholders, on such dissolution. A bill in equity will lie to enforce such liability without averring the insolvency of the company and without previous suit against it; *Spence v. Shapard et al.*, 6-118.

33. —. Semble, that if the statute created a joint liability of the stockholders, for the debts of a corporation, and not a several and individual liability, a court of equity would be the appropriate forum in which to enforce the liability; *Wincock et al. v. Turpin et al.*, 6-473.

34. —. Where a charter provides that the stockholders "are bound respectively for all the debts . . . in proportion to their stock holden therein," one of many creditors can not sue an individual stockholder at law, to recover the full amount of his debt. The remedy is in equity, where the extent of the liability can be ascertained, upon an account taken and a pro rata distribution had; *Pollard v. Bailey*, 5-68.

35. —. Under a statute which provides that a "judgment creditor, or any other creditor, may file a bill in equity in behalf of himself and all other creditors," of a corporation, to enforce the personal liability of the stockholders or directors of the corporation, the bill may be exhibited by two or more creditors, in behalf of themselves and all other creditors; and, a prayer that the defendant be ordered "to pay to the plaintiffs and to such other creditors as may become parties to the bill," the amounts due to them is not repugnant to a bill so framed; *Nat. Bk. v. Hingham Manuf. Co.*, 7-496.

36. —. A statute provided, that "where the whole capital stock of a corporation shall not have been paid in, and the capital stock shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." In enforcing such liability the proceeding should be in equity, prosecuted for the benefit of all the creditors, and the corporation is a necessary party; *Wetherbe v. Baker et al.*, 9-547.

37. —. A court of equity will, for the benefit of a creditor of an insolvent commercial corporation, compel a stockholder of

such corporation to pay in the amount of capital stock, which he has contracted with the corporation to take, i. e., when a stockholder has contracted with the corporation to pay in a certain amount of the capital stock he is bound by such contract and a court of equity will enforce it, for the benefit of creditors; *Harmon v. Page et al.*, **9-12**.

38. PERSONAL LIABILITY. In Illinois, an action at law will lie, by a single creditor, to enforce an individual liability created by the charter of an insolvent corporation. This right to sue at law does not, of necessity, exclude the jurisdiction of equity; *Eames v. Davis*, **9-129**.

39. —. A creditor, who is also a member of a corporation, can not maintain a bill, to enforce the personal liability of stockholders, for debts due by the corporation, before capital stock paid in, under a statute which authorizes a proceeding for the benefit of a plaintiff and such other creditors as may join therein; *Potter v. Stevens Mach. Co.*, **7-504**.

40. —. A stockholder who pays the amount of his individual liability to a firm of which he is a member, for a debt due such firm from the corporation, acquires an equitable right against his co-stockholders, recognizable and enforceable, only, in equity; *Buchanan v. Meisser*, **9-209**.

41. —. Equity will not sustain a bill to impose a personal liability on stockholders where the charter does not impose it, even though a majority of the stockholders shall have sought to impose such liability by law; *Reid et al. v. Eatonton Manuf. Co.*, **3-219**.

42. POWERS. If a corporation has a power granted — as a railroad company to lease its road — and in the exercise of the power exceeds it, a court of equity will give relief; so if in the exercise of a power granted, there be a contrivance for the purpose of defrauding the stockholders and sacrificing their rights, or to pervert the franchises and property from their legitimate purposes to fraudulent and illegal ends, equity will relieve against such exercise of the power. These are not, however, questions which may be investigated in a court of law; *Ottawa, Oswego Fox River Valley R.R. Co. v. Black et al.*, **6-359**.

43. —. Equity has no jurisdiction of an information by the attorney general, against a private trading corporation, whose proceedings are not shown to have injured, or endangered, any public or private rights and are objected to, solely, upon the ground that they are not authorized by its act of incorporation and are, therefore, against public policy; *Att'y Gen. v. Tudor Ice Co.*, **3-440**.

44. —. Equity will not, generally, interfere, on the petition of a general creditor, to restrain a corporation from selling even its entire property to a stockholder or director, where the sale is made with no fraudulent intent, for an adequate price, for the

purpose of paying corporate debts and where no shareholder objects; *Barr v. Bartram, etc., Manuf. Co.*, **3**-188.

45. **POWERS.** Equity will interfere to enjoin the purchase by a railroad corporation of the stock of another like company, at the instance of stockholders; *Cent. R.R. v. Collins et al.*, **3**-224.

46. **PROPERTY.** As a general rule, courts of equity will enjoin, on behalf of the stockholders of corporation, any improper alienation, or disposition, of the corporate property for other than corporate purposes; and, will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises, as well as the improper management of the business of the company, or a wrongful diversion of the funds. In such cases, relief may be granted at the suit of a single stockholder. So, if managers of a company are about to engage in any enterprise not contemplated by the company's charter, or, in general, if they are transcending the charter, equity will interfere; *Rogers et al. v. Lafayette Agricultural Works et al.*, **7**-67.

47. —. Though a corporation shall have ceased to do business for a number of years — in this case eight — and its officers and stockholders are, with two exceptions as to the latter, non residents of the state and there is no agent within the state, still, equity can not divest it of its title to its franchise and real estate by decreeing a sale thereof and distribution among the stockholders. Certainly it could have no such jurisdiction in the absence of some enabling statute and of the presence in court of all the stockholders as parties to the bill; *Croft, exec'r, v. Lumpkin Chestalee Mining Co.*, **7**-13.

48. —; **MISDIRECTION.** A bill for injunction having been filed, by a subscriber, complaining that a corporation and its directors were keeping the funds in a manner not authorized by the charter and by-laws of the company, and so as to endanger their safety, and a general demurrer, *ore tenus*, being interposed, by which the charge was admitted, the demurrer was overruled; *Pearson v. Tower*, **5**-540.

49. —; **CONVERSION; NO POWER TO CONVERT REAL ESTATE INTO MONEY, TO ENABLE A CORPORATION TO REALIZE BENEFITS.** Where real estate is devised to a corporation incapable of acquiring title in that way, a court of chancery has no power to convert such real estate into money, and direct the payment thereof to such devisee; *Starkweather et al. v. Am. Bible Soc.*, **5**-282.

50. —; **MISAPPROPRIATION.** Though officers of a corporation undoubtedly act in a fiduciary character, and may be called to account in equity, as trustees, yet, when they have ceased to be officers and the only complaint made against them is of an appropriation of the corporate funds to their own use and no discovery is sought, the reasons for seeking the aid of equity, which commonly exist in cases of breach of trust, are wholly wanting. The courts of law are adequate to give effectual relief and are the most

suitable tribunals; *Bay City Bridge Co. v. Van Etten et al.*, **6-601**.

51. PROPERTY; MISAPPROPRIATION. A majority of stockholders, no matter how great, have no right to divert the funds of an incorporated company to any other purpose than that for which the corporation was organized. A stockholder may file a bill in equity against the corporation to restrain any such diversion or misapplication; *Dudley v. Ky. High Sch.*, **5-382**.

52. STOCK. One who is entitled to stock which has been wrongfully transferred to another can maintain a bill in equity to have the wrongful certificate cancelled and other such issued to himself; if the loss of the stock can not be adequately compensated in an action at law; *Walker v. Detroit Transit Ry. Co. et al.*, **7-582**.

53. —. Courts of equity, in dealing with the relations between the corporation and its officers on the one hand and the stockholders on the other, in the management of the corporate affairs, look beyond the mere observance of forms of law and inquire if the authority has been, in good faith, exercised to promote the interest of the stockholders; *Wright v. Oroville Gold etc. Mining Co. et al.*, **3-146**.

54. —; UNPAID. Two or more creditors of an insolvent corporation, after having recovered judgments for their several demands, and the return of execution issued thereon, nulla bona, may unite in filing a creditor's bill against the corporation and its stockholders to reach unpaid subscriptions to the company, and such bill is not multifarious, as in such case there is an identity of interest in the question involved and in the relief sought, and the separate injury sustained by each complainant is produced by the same cause or wrongful acts and, also, because it prevents multiplicity of suits, which is, of itself, a direct source of equity jurisdiction; *Hickling et al. v. Wilson et al.*, **9-177**.

55. PURCHASE. If it be shown that a purchase of its stock by a corporation be to promote the interests of the officers of the company alone, and not the stockholders generally, or if for the benefit of a portion of the stockholders and not of all, or for the injury of all or only a portion of them, or if it operates to the injury of creditors, or would defeat the end for which the company was created, or if it be for any other fraudulent purpose, chancery will interfere; *Chicago, Pekin & Sou. Wn. R.R. Co. v. Town of Marseilles*, **6-387**.

56. —. A stockholder has such an interest as will entitle him to prevent the sale of corporate property by persons who have no lawful power, or mandate, to sell; *State, etc., v. Judge etc.*, **7-247**.

57. TRADE MARKS. Courts of equity may afford relief in cases of infringement upon the rights of property in trade marks, as a corporate name, on the ground of the injury to the party aggrieved and the imposition upon the public, independent of the question

whether there is any fraud or evil intent; *Holmes, Booth & Haydens v. The Holmes, Booth & Atwood Manuf. Co.*, **3**-210.

58. **TRANSFER OF STOCK.** A court of equity will take jurisdiction of a bill which avers that certificates of stock of a corporation have been stolen, the name of the true owner forged to a power to transfer and the stock sold and transferred on the corporate books, to compel the issue of new certificates of stock and an accounting for dividends declared, or in default thereof, to compel the purchasers to replace the stock. Such a bill is not demurrable for want of equity; *Blaisdell et al. v. Bohr et al.*, **9**-64; see, also, *Mach. Nat. Bk. v. Field et al.*, **7**-486.

59. **TRUSTS.** Where property or funds, or both, are donated by the state, to a corporation, in trust to carry out a certain object, and the fund has been put into lands and buildings it does not lose its character as a trust fund, although the property so acquired may be perverted from the use assigned; and a court of equity will, in a proper case, i. e., a case of waste, perversion, or inability, or indisposition of the trustee to execute the trust, pursue the fund and restore it to its original purpose, into whose-soever hands it may have come, unless held by innocent purchasers without notice; *Att'y Gen. v. Illinois Agric. College et al.*, **6**-393.

60. **ULTRA VIRES.** Where the acts of directors are outside and beyond the scope of their authority, stockholders are not bound by such acts, and may, without doubt, within a reasonable time, proceed, in equity, to have such acts cancelled and their rights protected from injury and loss growing out of the unauthorized acts; *Chetlain, adm'r, v. Repub. L. I. Co.*, **6**-397.

61. —. Even when it is conceded that some transaction is ultra vires the corporation, a court of equity will, in many instances, refuse to interfere with the corporation, at the suit of a stockholder, as to the unauthorized contract; as, where the contract is executed and, more especially, if the party complaining has stood by, allowing the transaction to be consummated and others to become interested under the contract; *Terry v. Eagle Lock Co. et al.*, **6**-319.

62. —. Where want of power is pleaded in favor of a corporation, to defeat the payment of the consideration for benefits which it has received and enjoined, courts will go so far as is consistent with rules of law to reach justice, equity and good conscience. On the other hand, where such want of power is pleaded against the corporation to prevent the perpetration of a wrong, courts will hold the corporation to the strictest rules of law; *Board etc. v. Lafayette etc. R.R. Co.*, **7**-26.

63. —. Information in equity, in the name of the attorney general, will lie against a quasi public corporation doing and contemplating acts which are ultra vires and illegal, the necessary effects of which are not only to impair the rights of the public,

but to create a nuisance; *Att'y Gen. v. Jamaica Pond Aqueduct Co.*, **9**-437.

64. PLEADING; ADMISSIONS. In a proceeding to foreclose a mortgage, executed by an alleged corporation, certain judgment creditors were made defendants. The bill averred the incorporation of the company under a general act for incorporating such associations, and the several amendments thereof, on November 15, 1871. The answers of the judgment creditors, defendants, admitted the allegation. It appears the license required by the statute was, in fact, not issued until January, 1872, a date subsequent to that of the mortgage sought to be foreclosed. The admission by answer was held conclusive upon defendants who had made it; *Wood et al. v. Whelen*, **6**-442.

See **CHURCH ORGANIZATION; INJUNCTION; INSOLVENCY; PERSONAL LIABILITY; RECEIVERSHIP; RELIGIOUS SOCIETY.**

ESCHEAT.

1. ENFORCEMENT OF ESCHATEAT. Proceedings to escheat property held by a literary, charitable, religious or benevolent society or corporation, in excess of the limit prescribed by the statutes of Pennsylvania, must be by quo warranto, as in case of the usurpation of a corporate franchise; *West's App'l*, **4**-111.

See **CHARITABLE ASSOCIATION.**

ESTOPPEL.

1. DOCTRINE OF. The doctrine of estoppel rests on the ground that some action has created relations and encouraged conduct which there may be difficulty in undoing. The rule originates in equitable principles and is not of universal application; *Doyle v. Mizner et al.*, **6**-635.

2. WHEN DOCTRINE APPLICABLE. When a contract is entered into which is within the delegated powers of a corporation, persons who deal with such corporation in its corporate capacity are, thereby, as a general rule, estopped from denying due organization, when sued on such contract; *Marion Savings Bank v. Dunkin*, **6**-113; *Chubb v. Upton*, **6**-23.

3. HOW APPLIED. The doctrine of equitable estoppel is only to be invoked to prevent injustice and wrong, and when the party claiming its protection would be defrauded and the other party be guilty of a fraud by the allegation or proof of the truth. It will not operate to prevent a defendant from proving the truth to free himself from liability on a contract into which he was induced to enter by the fraud and falsehood of the plaintiff; *Rochester Ins. Co. v. Martin*, **3**-486.

4. WHEN NOT APPLICABLE. Where no new rights have intervened and corporate existence has been recognized only by reason and means of fraudulent dealings carried on for the very purpose of entrapping a party into the acts on which such recognition is

based the rule does not apply. In such case if there be, in fact, no legal corporation and no fact which makes it unjust in law to deny corporate existence there is no room for an estoppel; *Doyle v. Mizner et al.*, 6-635.

5. WHEN NOT APPLICABLE. One who deals with a corporation in a matter not within the purview of its delegated powers, does not, thereby, estop himself from setting up in defense the want of authority, in the corporation, to make the contract; *Marion Savings Bank v. Dunkin*, 6-113.

6. INSTANCE OF NON APPLICABILITY. The accommodation drawer of a bill of exchange, which was discounted, by a banking company, for the acceptor, who procured it by means whereof to raise money for his own use in that way — the drawer not being aware of this and not being present at or participating in the negotiation — is not, thereby, estopped from denying the proper organization of the banking corporation, when sued by it on the bill. *Id.*

7. TO DENY CONSTITUTIONALITY OF CHARTER. Stockholders and those whose acts contribute to the organization of a corporation, under a charter, who reap the benefit of that grant, and, thereby, induce persons to give credit to the company or to deposit funds with it, on the faith of the legality of the organization and the individual liability of its stockholders, are estopped from alleging that the charter of the company is unconstitutional, in defense of an action seeking to fix their personal liability under the charter; *M'Carthy v. Lavasche*, 6-419.

8. UNCONSTITUTIONAL CHARTER. Even though the provisions of a charter may be unconstitutional; yet, if the stockholder has acted under it and, thereby, induced, or contributed to, the loss of a creditor of the corporation, the stockholder is estopped from denying his liability under its provisions; *Dows v. Naper*, 6-424.

9. TO DENY CORPORATE RIGHTS. The state will be estopped to deny the right of a corporation to organize and carry on a particular business, under a general incorporation law, when, by subsequent acts of legislation, the legislative department of the state has clearly and plainly recognized such rights; although there were no express words of the original act giving such authority; *People v. Perrin*, 6-267.

10. CORPORATION NOT ESTOPPED BY ACTS OF STOCKHOLDERS. A corporation is not estopped by acts of individual stockholders, who, being admitted as parties to a suit wherein the corporation was a party, filed pleadings, therein, for themselves only and not for the corporation. The corporation is not bound by the action of the court on such pleadings, although they may have set up the same facts, as ground for relief, which are afterward relied upon by the corporation in another suit; *Covington & Lex. R.R. Co. v. Bowler's heirs et al.*, 4-404.

11. INVALID TITLE. An estoppel can not operate to validate a

title attempted to be vested by an act prohibited by law ; *Martin v. Zellerbach*, 1-170.

12. AGAINST CREDITORS. An estoppel, as against a debtor corporation, does not necessarily conclude the creditors of such corporation. *Id.*

13. A judgment creditor is not estopped from denying the title of the debtor in property sold under execution for the satisfaction of his judgment. *Id.*

14. The general principles governing the doctrine of estoppel in pais stated. *Id.*

15. BY ACQUIESCENCE. It is not essential that there be an express assent on the part of stockholders to work an equitable estoppel on them. When they neglect, promptly and actively, to condemn an unauthorized act and to seek judicial relief after knowledge of the commission of it, this will be deemed an acquiescence in it ; and, if innocent third persons have been led thereby to put themselves in a position where harm would come to them if the act were held invalid, the stockholders are estopped from questioning it ; *Kent v. Quicksilver Mining Co. et al.*, 8-613.

16. BY ASSENT AND ACQUIESCENCE. A bondholder who, at the time of the consolidation of companies, declined to have his securities converted into stock, such conversion being then in his power, and who had assented to the consolidation and afterward acquiesced therein, is bound by all the legal consequences and effects of the union of companies, and is precluded from impeaching the arrangement ; *Tagart and Bennett, ex'rs, v. Northern Central Ry. Co.*, 6-362.

17. PASSIVE CONDUCT AS. Merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their means and to alter their condition, and, thereby, renders it unconscientious for him to enforce his rights ; *Covington & Lex. R.R. Co. v. Bowler's heirs et al.*, 4-404.

18. AS TO CORPORATE ACTS. Where a person coming has in no wise changed his conduct in consequence of acts done ; has predicated no action upon them ; assumed no liabilities ; made no payments ; and, been in no manner prejudiced, there is no room for the doctrine of estoppel and the acts of agents of the corporation, in such case, are open to explanation and control by parol proof that they were committed under a mistake of fact ; *Starrett v. Rockland Fire & Mar. Ins. Co.*, 7-271.

19. DIRECTOR, BY HIS OFFICIAL ACT. A corporation duly executed to plaintiff a real estate mortgage, for valuable consideration, which, through mutual mistake of parties, mis-described the premises agreed and intended to be mortgaged. Plaintiff caused the mortgage to be duly recorded. Defendant, Russell, one of the directors of the corporation, who participated in the giving of the

mortgage and in the mistake, afterward obtained a judgment against the corporation and duly docketed the same, so as to make it a lien upon the premises intended to be conveyed, before the discovery of the error. In an action, by plaintiff, against the corporation and Russell, to correct the error and to foreclose the mortgage as a prior lien to Russell's judgment it was held, that Russell was estopped from contesting the relief sought; *Gill v. Russell*, impleaded etc., 7-611.

20. ACT OF CASHIER. No estoppel arises against a corporation from a letter written by its cashier (bank), to a firm which originally held stock, or to the retiring member of the firm who transferred his interest to his successors, stating that there was no lien or incumbrance on such stock, the letter containing no intentional misrepresentation and having been written some time before any interest in the stock was acquired by the equitable assignee of the retiring member of the firm; *Plant. & M. M. I. Co. v. Selma Sav. Bk.*, 6-171.

20½. IMPLIED POWER. An attempt to imply authority to sell stock from other acts of the agent of a different character, done without authority, but approved by the principal, does not constitute an estoppel; *Woodhouse v. Crescent Mut. Ins. Co.*, 10-472.

21. BY PARTICIPATION. Where a person participates in all the proceedings in creating a corporation and in increasing its stock and making the calls on the subscriptions, both as stockholder and director, he is estopped to deny the validity of such proceedings in a suit against him to compel payment of calls on his stock subscribed for; *Kansas City Hotel Co. v. Harris*, 8-89.

22. —. A stockholder, made liable, by statute, to the corporate creditors to an amount equal to the amount of capital stock held by him, being sued, under the statute, for the recovery of a debt owing by the corporation, if he had participated in the affairs of the company, attended stockholders' meetings and known that the company was engaged in business, acquiring property and incurring debts, as well as that the capital stock had not been fully subscribed for and taken, will be estopped from pleading the partial subscription to the capital stock. In such case, however, the debt must have been contracted on the faith of some act, or acts, or participation on his part; *Garling v. Baechtel*, 7-345.

23. CONTRACT BEFORE ORGANIZATION. Services were rendered to a company under a contract made before the recording of the proper certificate as required by statute. The work was accepted by the company after incorporation was completed. The company was estopped to deny its liability to pay; *Grape S. & V. Manuf. Co. v. Small*, 5-424.

24. BY CONTRACT. One who contracts with a de facto corporation, as a corporation, can not in an action against him on the contract, impeach the legality of the corporate organization; *Butch.*

& D. Bk. *v.* M'Donald, exec., 7-535; Chubb *v.* Upton, 6-23; Marion Sav. Bk. *v.* Dunkin, 6-113.

25. BY CONTRACT. A borrower making payments to a receiver, appointed for his creditor in proceedings to which he was not a party, can not, afterward, in proceedings against him to enforce the payment of his indebtedness, question the validity of the appointment; Burton, rec'r, *v.* Schildback et al., 7-566.

26. TO DENY CONTRACT. While corporations will not be permitted to exercise powers, which might be hurtful to the public interests, beyond those expressly conferred by their charters, such corporations will be estopped from denying their authority to contract after having exercised powers germane and incidental to those conferred and in furtherance of the general objects of their incorporation; nevertheless, the subject of the contract may not be within any definite power expressly granted; West et al. *v.* Madison Co. Agric. Board, 6-394.

27. CONTRACTS. A corporation has no existence apart from its officers conducting its affairs and who represent the shareholders. As between themselves, any contract fairly entered into would seem to be valid. At all events, a corporation will be estopped to say its contract is ultra vires and sue its stockholders upon obligations, arising by implication of law, that it has once solemnly waived. But, no such doctrine can be applied to creditors of a corporation; Union Mut. Life Ins. Co. *v.* Frear Stone Manuf. Co. et al., 6-48.

28. BY DEALINGS. By making a contract, as a mortgage, to secure the payment of a promissory note, the mortgagor precludes himself from questioning the fact of the proper organization of the company; Ray et al. *v.* Indianapolis Ins. Co., 4-387.

29. TO DENY CONTRACT. The secretary of a corporation was, in fact, one of two "managing men" of such corporation. His authority was assumed, by the court, to be equivalent to that of a general agent. He informed a contracting party that the contract executed signed by the president, "was duly executed to bind" the company. The party relied and in good faith acted upon such information. Held, that the corporation was estopped to deny the contract; Perry *v.* Simpson Waterproof Manuf. Co., 4-309.

30. BY CONTRACT. One who contracts, by deed, with a corporation as such is estopped to assert that there is no such corporation; Baker et al. *v.* Neff, 7-106.

31. —. One having made a contract with a company, in its corporate name, thereby admits that it is duly constituted a body politic and corporate, at the time of the execution of the contract, and is estopped from setting up, for defense, the non allegation of the fact of corporate existence by the company in suit brought on the contract; and, in such suit the corporation need not state

where it has its residence, or principal place of business ; *Nat. Ins. Co. v. Bowman et al.*, 8-141.

32. BY CONTRACT. It is well settled, in the state of Indiana, that a party who contracts with what purports to be a corporation is estopped from denying its corporate existence at the date of the contract ; *M'Broom v. Corporation of Lebanon*, 1-373.

33. AS TO PERSONS NOT STOCKHOLDERS. Persons who are not stockholders in a company, and who have never contracted with it as a corporation, are not estopped from denying its corporate existence ; *Piper et al. v. Rhodes et al.*, 1-360.

34. DEFUNCT COMPANY. Although a member of a corporation, which has ceased to exist, may have sold property which belonged to it and received the proceeds thereof and, in doing so, might have dealt with the company as a corporation, he will not be estopped from setting up the defense that the company had, prior to that time, ceased to exist as a corporation and was no longer capacitated to sue its members, as such ; *Krutz v. Paola Town Co.*, 7-124.

35. ACCEPTANCE OF CORPORATE OBLIGATION. Where a person, in his dealings with a corporation, has accepted a promissory note for money due him from the corporation, and subsequently, in a suit upon the note against the corporation, as such, recovers judgment, he ought to be for ever thereafter estopped to assert that the note was the individual obligation of the officer executing it on behalf of the corporation ; *Scanlan v. Keith*, 9-143.

36. GENERAL RULE. If a stockholder intends to treat an act of the corporation, or of its officers or agents, as illegal, he must, when he has notice that it is contemplated, insist upon his objection before it is committed. He can not stand by and see it done, and then complain to the prejudice of others involved in it ; *Samuel v. Holladay*, 1-139.

37. EXECUTED CONTRACT. Where a corporation sells and conveys all its property for an illegal purpose, it can not avail itself of the illegalities of the sale after the contract has been fully executed by both parties, and the property has passed into the hands of a third person without notice ; *Miners Ditch Co. v. Zellerbach*, 1-250.

38. TO DENY LIABILITY AFTER RECEIVING BENEFIT OF CONTRACT. Where power is conferred upon a corporation to borrow money and secure the same by mortgage on its property, such corporation, after having received the loan on the security of its mortgage, will not be allowed to avoid liability by questioning its power to make the mortgage, or showing a defective execution of the powers conferred upon it ; *Thomas v. Citizens Horse Ry. Co.*, 9-189.

38½. In a suit to foreclose a mortgage, executed by a consolidated railroad company, it will not be permitted to question the

validity of its contract of consolidation; *Racine & M. R.R. Co. v. Loan etc. Co.*, **1-441**.

39. **BETWEEN COMPANIES.** Plaintiff company conveyed to defendant its road bed, ties etc., upon conditions named in a written instrument. Defendant company took possession and expended thereon a large sum of money, building depot buildings, water tanks, and other appurtenances, and completed the road. The stockholders and directors of complainant stood by, making no objection at the time. Held, that they were estopped from, afterward, alleging the invalidity of the contract of transfer on the ground of irregularity; *Mahaska County R.R. Co. v. Des Moines Valley R.R. Co.*, **3-325**.

40. **AS TO RIGHT OF WAY.** The owner of land who stands by, without objection, and sees a public railroad constructed over it, can not, after the road is completed, and large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoin its use by the railroad company; *Goodin v. Cincinnati & White Water Canal Co. et al.*, **3-652**.

41. **ACTION OF COMMON COUNCIL.** Where an invalid assessment is levied upon the stock of a city, subscribed for in a corporation, a vote of the common council of the city, authorizing its payment, will not preclude the city from setting up any legal defense to the assessment; *Pike v. Bangor & C. S. L. R.R. Co. et al.*, **7-323**.

42. **STATUTE OF INDIANA.** Under the statute of Indiana "for the incorporation of cities," a property owner can not permit, without objection, money to be expended in work which benefits his land, under a contract with the city in which it is situated, and then deny the power of the city to make the contract; *Hallencamp v. City of Lafayette*, **2-225**; *Palmer v. Stumph*, **2-216**.

43. **ULTRA VIRES.** It is too late after a corporation has received the full benefit of a contract entered into, and when it is called on to perform its part, to set up that such contract, on the part of the demandant, was an abdication of a specific corporate function; *Hall Manuf. Co. v. Amer. Ry. Supply Co.*, **7-597**.

44. —. If a contract with a national bank can be valid under any circumstances, an innocent party has a right to presume the existence of such circumstances, and the corporation is estopped to deny them; *Merch's Nat. Bank v. State Nat. Bank*, **3-25**.

45. —. The maker of a promissory note not negotiable, discounted by a national bank, can not question the right of the bank to recover on it, on the ground that such bank has no right to deal in such paper; *Nat. Bk. v. Gillilan*, **8-243**.

46. —. A party dealing with a corporation, in a matter not within the purview of its delegated power, does not estop himself from setting up in defense the want of authority in the corporation to make the contract; *Chambers v. Falkner*, **6-182**.

47. **CORPORATE EXISTENCE ADMITTED.** Where a party prior to the passage of the act of 1857, executed and delivered to the "Racine and Mississippi Railroad Company," the corporation organized under such act of consolidation, his promissory note, and which was afterward, and before its maturity, assigned by the company through its president: Held, in an action upon such note by the assignee, against the maker, that the defendant, by executing his note to the company, thereby admitted its corporate existence, and, in order to avoid its payment for the want of a party with whom to contract, he must prove that no such body existed in fact; *Mitchell v. Deeds*, 1-460.

48. **SIGNER OF PETITION.** The signer of a petition to the county commissioners for the organization of a corporation to build less than five miles of road, and who has become a member of it, is not estopped from denying the legality of the organization in a suit to enjoin the collection of taxes assessed for its benefit; *Green, treas., v. Beeson et al.*, 1-362.

49. **FILING ARTICLES.** Where a paper has been filed, under a statute and in attempted compliance therewith and it is shown to have been filed as a corporate act, a foreign corporation and those claiming under it are precluded from objecting to its contents, on the ground that it does not come up to the requirements of the law; *Evans v. Lee*, 8-338.

50. **SUBSCRIPTION FOR STOCK.** Suit on subscription for stock, signed upon articles preliminary to incorporation. The corporation must aver the steps to and prove a lawful incorporation. The subscriber in such case is not estopped to deny its legality; *Nelson v. Blakey, ass'e etc.*, 7-23.

51. —. Semble, that after the recording of the certificate of incorporation, as required by statute, and the corporation has organized and liabilities been incurred, defects in such certificate can not be set up in defense of a subscriber, in an action, against him, to compel the payment of an assessment on his shares; *Baile v. Cal. Coll. Educ. Soc.*, 7-379.

52. —. Where subscribers to the stock of a private corporation meet, elect directors, effect a permanent organization and engage in a corporate enterprise, incurring debts and voting and acting as bona fide subscribers, they will not be allowed to deny the legality of organization, but, will be held to pay their subscriptions, in favor of creditors; *Hickling v. Wilson et al.* 9-177.

53. **TO DENY CORPORATE EXISTENCE.** Certain stockholders of a corporation had signed the certificate of incorporation, accepted the office of trustees under it and, in that capacity, acquired possession of the corporate property. In an action against them they denied the corporate existence, alleging irregularities in the certificate. Held, they were estopped; *Parrott et al. v. Byers et al.*, 4-282.

54. **BY SUBSCRIPTION TO STOCK.** A contract of subscription is

between the corporation on the one hand, and the subscribers on the other. It is not competent for one of the contracting parties to question the reputation of the organization of the corporation, the stock of which is subscribed for, or the authority of its officers; *Busey et al. v. Hooper et al.*, 4-430.

55. PARTICIPATION IN ASSESSMENT. A stockholder who has participated or acquiesced in the action of the body of stockholders in laying an assessment, which should, under the law, be levied by the board of directors, as by voting for a by-law directing that such levy should be made by the stockholders, themselves, is estopped afterward to object that the assessment was levied without proper authority; *Williamette Freighting Co. v. Stannus*, 4-64.

56. —. H. was a stockholder and director in the corporation. In both capacities he had participated in the action of the officers in laying the assessment complained of. Held, that he was estopped from raising any question as to the validity of the proceedings; *Kansas City Hotel Co. v. Harris*, 4-517.

57. BY PAYMENT OF CALLS. Paying calls on shares subscribed will estop an original subscriber for shares from denying his liability for future calls; *Hamilton et al. v. Grangers L. & H. Ins. Co.*, 9-55.

58. PAYMENT WITH NOTICE. If a certificate of stock in a corporation expressed in the name of "A. B., trustee," is by him fraudulently pledged for his own debt, and accepted without inquiry; and the pledgee, after receiving notice of the fraud, and a demand of the parties beneficially interested under the trust that the stock shall be held subject to their direction, voluntarily pays an assessment due on the stock, to one of them, as treasurer of the corporation, in the presence of the other, such payment does not estop them from maintaining their claim to the stock; *Shaw v. Spencer et al.*, 1-625.

59. —. The mere fact that a stockholder — in a manufacturing corporation — pays his subscription knowing that the whole capital stock of the company has not been subscribed for and that the company is incurring debts, is not such an act of participation as will estop him, when sued by a creditor of the company, from setting up, as a defense, the partial subscription to the capital stock; *Garling v. Baechtel*, 7-345.

60. FRAUD IN SUBSCRIPTION. Where one signs his name to a stock subscription list, but leaves a blank as to the amount of stock subscribed for, the object would seem to be to allow the promoters of the organization to represent him as a subscriber when, as a fact, he is not. This is a palpable fraud — moral and legal. Wherefore, if a party shall have so signed, as a creditor of the company, he will be held to have authorized the filling of the blank and estopped to question the authority so to do; *Jewell v. Rock R. P. Co. et al.*, 9-71.

61. **IMPROPER PAYMENTS.** The legality of the organization of a corporation can not be questioned by a subscriber, to escape liability on his stock note, on the ground that instead of requiring a cash payment, as required by law, from all subscribers of stock, the corporation accepted notes secured by real estate mortgages; *Home Stock Ins. Co. v. Sherwood*, 8-268.

62. **TRUSTEESHIP.** A statute provision that "no person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable, as a stockholder, accordingly," etc., does not cover or reach the case of capital stock issued to be held in trust for the corporation itself, or placed in escrow, or as collateral security, to prevent the holder thereof, in whose name it stands upon the books of the company, from liability on it, if he, by his acts, shall have estopped himself to deny liability as a stockholder; *Griswold v. Seligman*, 8-247.

63. **CORPORATE LIEN.** If a corporation has a lien, on stock, for a debt due it from a stockholder, it is not estopped to assert such lien by the fact that on the stockholder's presenting the certificate for transfer to the person in charge of the transfer book, such person promised to make the transfer and issue a new certificate, on the return of a certain officer; *Bishop v. Globe Co.*, 9-468.

64. **INNOCENT PURCHASER.** If the rightful owner of shares of stock has invested another with the usual evidence of title, or an apparent authority to dispose of the stock, he is estopped from making any claim against an innocent purchaser, who takes on the faith of such apparent ownership or right of disposal; *Walker v. Det. Trans. Ry. Co. et al.*, 7-582.

65. **TRANSFER FOR VALUE.** One who has transferred a certificate of shares of stock can not, afterward, in his own defense, object to the transfer, on the ground that it was not made in the mode prescribed by the corporate by-laws or charter; *Home Stock Ins. Co. v. Sherwood*, 8-268.

66. **AS TO THE STATE.** That the state has instituted a criminal prosecution for breaking down a toll gate, described in the indictment as the property of a corporation named, is no bar to an information to contest the valid organization or existence of the supposed corporation; *State, ex rel. Collings, v. Beck et al.*, 9-227.

67. **DE FACTO CORPORATION.** Where persons have subscribed and filed articles of association under a general law for the organization of corporations and there has been long user of franchise of being a corporation and dealings large in amount and extensive in respect of number and variety of transactions, one who has, for a series of years, dealt with the concern as a corporation and, in the particular transaction in litigation, has acknowledged the

corporate existence, will not be allowed collaterally to attack the validity of the corporate entity, that he may charge against the individual members of the company the precise obligation which was unequivocally accepted as a corporate one; *Merchants & Manufacturers Bank v. Stone et al.*, 6-609.

68. BY APPEAL. An appeal was prosecuted to the supreme court in the name of a corporation, judgment debtor, by the name it bore at the time of suit brought. The corporation having, after suit brought and before judgment entered, consolidated with other companies under a new name, moved in arrest of judgment. The court at nisi prius overruled this motion. Held, that the motion was properly overruled, it being a matter not competent to be raised by motion and that the plaintiff in error was estopped to deny its existence in the appellate court; *E. Tenn. & Ga. R.R. Co. v. Evans*, 4-186.

EVIDENCE.

1. JUDICIAL NOTICE. A legislative enactment incorporating a city is a public enactment, of which the courts take judicial notice; *People v. Potter*, 2-66.

2. —. A judge of the superior court, in Connecticut, sitting as a special tribunal upon an appeal from a sewer assessment, under a provision of a city charter allowing such appeal, takes judicial notice of the provisions of the charter, whether it be regarded as a public or a private statute; *Clapp et al. v. City of Hartford*, 2-107.

3. JUDICIAL NOTICE OF CORPORATE EXISTENCE. In a state in which corporations may be organized, under a general statute, the courts do not take judicial notice of the existence of a corporation; *M'Broom v. Corporation of Lebanon*, 1-373.

4. CORPORATE EXISTENCE. A plea denying that the plaintiff is a corporation is overcome by proof that defendant sold plaintiff land and executed to it a deed of conveyance, thus recognizing it as a corporate body; *Wood v. Kingston Coal Co.*, 1-437.

5. —. Proof of the company name raises no presumption that it is incorporated, nor does the occurrence of the name of a state in such name raise the presumption that it was incorporated under the laws of such state; *Briggs v. M'Cullough and Dinsmore*, 1-231.

6. AS TO CORPORATE EXISTENCE. A registry copy of the certificate of a corporation's organization is admissible in proof of its corporate capacity, after due notice to the company to produce the original and its failure so to produce; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

7. ELECTION OF TRUSTEES. On the trial of an indictment charging a trespass upon the realty of a corporation it is competent to prove the election of trustees by parol testimony; at least it is so in the absence of some statutory provision to the effect that such election

can only be proved by written evidence; *White v. State*, 7-101.

8. AS TO WHO ARE TRUSTEES ACTING. When acting trustees are named in an indictment as the owners of property, through which they are injured, as a corporate body, it is competent to prove their trusteeship and names by parol testimony. *Id.*

9. USER OF FRANCHISES. A user of franchises raises the presumption, in a collateral proceeding, that a corporation is in the rightful exercise of such power; *Briggs v. McCullough et al.*, 1-231.

10. COMPETENT PAROL. It is competent for a plaintiff in an action founded on a certificate of deposit, against a corporation, to prove by parol, that the defendant had exercised the privileges conferred by the charter; that it had a regular place of business and a secretary who transacted the business of the company; *Talladega Ins. Co. v. Landers*, 3-102.

11. MEETING OF TRUSTEES. Where the by-laws of a corporation provide that a quorum of trustees shall be necessary in order to transact business and it appears, from the minutes, that a meeting was held and the business of the company transacted, the presumption is, in the absence of evidence to the contrary, that a quorum was present; *Baile v. Calvert Coll. Educ. Soc.*, 7-379.

12. CERTIFICATES OF INCORPORATION. Defects in certificates of incorporation are cured by the provisions of the act of the legislature of California, of April 1, 1864; *Larabee v. Baldwin et al.*, 1-207.

13. COPY OF ARTICLES OF ASSOCIATION. Where it is proved that the original articles of association of a corporation are lost, the record of the copy, filed in the recorder's office, is admissible in evidence; *Washer v. Allensville etc. Turnpike Co.*, 9-223.

14. NUL TIEL CORPORATION. Upon the trial of an issue as to the corporate existence of a party, the original articles of incorporation, properly recorded, may be read in evidence, without a certificate of the clerk that it is a true copy; *Fortin et al. v. U. S. Wind Eng. etc. Co.*, 1-437.

15. —. The rule is well settled in the state of Illinois that under a plea of nul tiel corporation where an organization in fact and a user is shown, the existence of the corporate body is proved; *Mitchell v. Deeds*, 1-460.

16. ANSWERS TO INTERROGATORIES. The answers made by a defendant corporation to interrogatories filed with the complaint are proper evidence for the plaintiff; *Louisville, New Albany & Chicago Ry. Co. v. Henly et al.*, 9-282.

17. —. The treasurer of a foreign savings bank having answered to an interrogatory, in a deposition, that the books of the bank, which were in his custody, showed that the bank had had business with a certain person, was asked to give an exact transcript of the entries in the book relating to the business.

His answer was, "see statement annexed." What purported to be a transcript of the books relating to the business was annexed to the deposition. It was held, that it sufficiently appeared that the transcript had been compared with the originals and was a true copy; *Ide v. Pierce*, ex'r, 9-458.

18. FILING INTERROGATORIES. A party to a civil action to be entitled to file interrogatories under section 50, chapter 129, general statutes of the state of Massachusetts to an alleged officer of the other party, must prove, to the satisfaction of the presiding judge, that the other party is a corporation; *Gott v. Adams Exp. Co.*, 1-623.

19. WHEN INCORPORATION MUST BE PROVED. In an action against an express company, it was alleged that the defendants were "a company having a place of business" in the state of Massachusetts. The answer denied each and every allegation of the plaintiff. It was held that, whether or not the declaration sufficiently alleged that the defendants were a corporation, the plaintiffs were bound to prove it if they denied it as a fact at the trial. *Id.*

20. ACT OF GENERAL ASSEMBLY. In an action against a board of commissioners to recover damages for injuries to a mill dam, which it was alleged were caused by the erection of a wall by the defendant upon a public road, adjoining the river in which the dam was situated, it was held, that an act of the general assembly, authorizing the building of a bridge near the point in controversy, and which recognized the road in question as a public road, when accompanied by proof that the plaintiff's grantor was cognizant of the application to the legislature for the passage of the law, knew and approved its provisions, and acted under it as one of the commissioners, was competent for the purpose of showing the admission of such grantor that the road was a public road, and also for the purpose of showing its regulation as such by the legislature; *Tyson v. Com'rs*, 2-391.

21. OPINION OF OFFICERS. The opinion of persons appointed by the county commissioners to examine a wall complained of, as a part of the public road, with reference to its probable effect upon the property adjacent thereto, is not admissible in evidence against the public, for the purpose of showing that but for such wall the water would escape around the abutment of a dam, and also, that the wall injured or damaged such dam and the mill property connected therewith. *Id.*

22. FINDING OF COMMISSIONERS. After the final ratification and return of the commissioners appointed to lay out and condemn a public road, their proceedings can not be collaterally impeached, either on the ground that no damages or insufficient damages were allowed. *Id.*

23. ALTERED ASSESSMENT ROLL. An assessor, in the state of Nevada, has no authority to alter an assessment roll after it has

been delivered to the collector for collection. An alteration so made will be treated as made by a stranger; when the roll is offered in evidence by the state; *State of Nevada v. Manhattan Silver Mining Co.*, 2-607.

24. **AUTHORITY OF OFFICER.** The sufficiency of evidence to establish the obligation of a corporation under a contract made by its agent considered and determined; *Merrick v. Reynolds Engine and Governor Co.*, 3-405.

25. **DECLARATION OF OFFICER.** The superintendent and secretary of a corporation, being its general agents for the transaction of its business, their declarations concerning a debt previously contracted and within the scope of their authority is admissible in evidence, under the exception to the rule excluding the declarations of an agent made subsequent to the transactions to which they relate; *Webb, rec'r, v. Smith*, 9-43.

26. **CONVERSATION OF AGENT.** The conversations of an agent of a defendant corporation, authorized to make and modify the contract sued on, had, at the time, concerning it and its terms, are proper evidence for the plaintiff; so, also, the conversations of others which are part of the *res gestæ*; *Louisv., N. Alb. & Chi. Ry. Co. v. Henly et al.*, 9-282.

27. **BURDEN OF PROOF.** If the consignor would impeach a special contract limiting the liability of an express company for loss of goods, upon any ground of duress or fraud practiced to procure his assent to it, the duty of making proof of the facts relied on devolve on him; *Adams Exp. Co. v. Loeb & Bloom*, 3-344.

28. **EXECUTION OF DEED; BURDEN OF PROOF.** A deed bearing the signatures of the proper officers and the corporate seal is *prima facie* the deed of the corporation. The burden of showing that it was improperly executed is upon the party objecting to it; *Miners Ditch Co. v. Zellerbach*, 1-250.

29. **RECORD.** In an action against a stockholder to recover a debt, owing by the corporation of which he is a member, a bond signed by the president, secretary and treasurer of the corporation is admissible, for the purpose of proving an acknowledgment of an indebtedness by the company. The record of proceedings of stockholders is admissible to prove the circumstances under which the bond was issued; *Garling v. Baechtel et al.*, 7-345.

30. **CORPORATE RECORDS.** The books of a corporation are competent evidence, for and against its members, in an action between the corporation and its members; *Washer v. Allensv. etc. T. Co.*, 9-223.

31. —. On trial of an action for deceit in the sale of the stock of a corporation, defendant called as a witness the treasurer of the corporation, who produced his cash book and testified that he showed it to the plaintiff before he bought his stock of the defendant. It was held to be competent, on the part of plaintiff, to

cross examine the witness as to the manner of keeping this book and to show that it was not fairly kept and did not contain a correct statement of the affairs of the corporation; *Teague v. Irwin*, 9-461.

32. CORPORATE BOOKS. If the books of a corporation are admissible in evidence and are not within the jurisdiction of the court, copies of them, properly verified, are admissible; *Ide v. Pierce*, executor, 9-458.

33. BY-LAWS. In an action, by receivers of a corporation against a subscriber, to recover his subscription to the stock of the company, a book of by-laws, produced by himself, upon request of plaintiffs, and testified to be the by-laws under which the corporation acted, is admissible. Against a member of the company such by-laws are always admissible; *Frank v. Morrison et al.*, receivers, 9-390.

34. DECREE APPOINTING RECEIVERS. A decree, in a cause in equity, appointing receivers to wind up the affairs of a corporation and directing them, as such receivers, among other things, to make all collections of outstanding indebtedness to the corporation and to institute all such proceedings, at law and in equity, as might be necessary for the purpose of enforcing the corporate rights, is admissible in evidence, in a suit to recover from a subscriber to the stock of the company the amount due upon his stock to prove the due appointment of plaintiffs as receivers and their authority to institute and conduct the suit. *Id.*

35. OWNERSHIP OF SHARES. Upon the question whether E. was the owner of certain certificates of shares of stock in his possession, or whether he was merely the custodian thereof for P., the certificates having been issued to E., and bearing upon their backs assignments from E. to P., it is competent for P. to show that E., at the same time, held in his possession, as custodian for P., other certificates of shares in the same company, issued directly to P., and belonging to him; *Eaton v. New England Telegraph Co.*, 7-313.

36. UNPAID SUBSCRIPTION. In an action by a creditor to recover from stockholders, individually, an indebtedness for their corporation, on the ground of fraud in the purchase of property, in payment for which the stock was issued, the value of the property must be determined and evidence thereof is competent; *Douglass v. Ireland*, 8-517.

37. SUBSCRIPTION TO STOCK PROCURED BY FRAUD. Where a party has been entrapped into a contract, of subscription for stock, by false representations, evidence is not admissible to show that if defendant will pay under the contract, notwithstanding the fraud, his money will be so used as that he will sustain no harm; *Water Valley Manuf. Co. v. Seaman*, 8-32.

38. AVOIDANCE OF LIABILITY. In a proceeding to enforce the liability of a stockholder on shares of stock he holds and has

acted upon to vote them, albeit he did not subscribe nor promise to pay for them, parol evidence is not admissible to show that the stock was voted under an arrangement with the company made, outside of the written contract, for a specific purpose, to the effect that such holder should have the privilege of voting the stock without attendant liability; *Griswold v. Seligman*, 8-247.

39. AVOIDANCE OF LIABILITY. In such case it is not necessary to show that the creditor became such subsequently to the acquisition of the stock by the defendant, or in consequence thereof, or altered his condition by giving credit to the company on the faith of defendant being a stockholder. *Id.*

40. UNDER CREDITOR'S BILL. In an action against a corporation, in the nature of a creditor's bill, the judgment against the corporation is, at least, prima facie evidence of the liability of the corporation; *Hastings, rec'r etc., v. Drew et al.*, 8-560.

41. DECREE AGAINST CORPORATION, AS AGAINST STOCKHOLDER. A decree obtained against a private corporation on a bill in chancery filed after a stockholder had ceased to be a member of the company, by taking property of the company for his stock, is evidence of the indebtedness of the corporation on a bill by the creditor against such stockholder to subject the property taken by him to the payment of such decree; *Clapp et al., execrs., v. Peterson*, 9-172.

42. WANT, OR FAILURE, OF CONSIDERATION. Under the tenth section of the statute of Illinois regulating negotiable instruments, where a want or failure of consideration is pleaded, it must be proved by the party alleging it; *Mitchell v. Deeds*, 1-460.

43. MUST BE SHOWN BY A PREPONDERANCE OF EVIDENCE. In this case, such defense having been set up by the defendant, it devolved upon him to prove that the plaintiff, who received the note before its maturity, had notice of such defense at the time he so received it. This issue, like all other affirmative issues, should be proved by a preponderance of evidence. *Id.*

44. FALSE REPRESENTATIONS. In such case, when the defendant also set up as a defense that the note was procured from him by the company by means of false and fraudulent representations made by its officers, to the effect that these companies had legally consolidated, and the proof showed that articles of consolidation between the parties had been drawn up and signed, and officers of this new organization had been elected, and had entered upon the discharge of their duties. Held, that this was sufficient to repel the presumption of false representation that the companies had legally consolidated, unless the persons making them knew that the consolidation was illegal and unauthorized. *Id.*

45. FRAUDULENT REPRESENTATIONS. The defendant, also, having set up as a defense that he was induced to execute said note by means of false and fraudulent representations, made to him by the officers of the company, concerning its solvency, and the pro-

gress of its road to completion, he must prove it, otherwise he must fail on this issue. Where fraudulent representations are relied upon as a defense, they must be established like any other fraud. *Id.*

46. PROOF OF CANONICAL MATTERS. The testimony of a bishop of the Protestant Episcopal Church is competent to prove the meaning of terms, "parish" and "rector," as used in such church; *Bird v. St. Mark's Church*, 10-364.

47. SERVICE OF SUMMONS. Acceptance of the service of summons and complaint, by one who signs such acceptance as secretary of the corporation is not, of itself, sufficient evidence that he bears the relation by him claimed to the company; *Talledega Ins. Co. v. Woodward*, 3-116.

See AGENT; ATTORNEY; CONTRACT; CORPORATE DEED; CORPORATE RECORDS; CORPORATE RESIDENCE; CORPORATE SEAL; CRIMINAL LAW; DIRECTORS; FOREIGN CORPORATION; PERSONAL LIABILITY; STOCK AND STOCKHOLDERS; SUBSCRIPTION FOR STOCK; WITNESS.

EXECUTION.

1. AT COMMON LAW. Shares of stock in incorporated companies are not liable to levy of execution at common law. Positive provisions of statute are requisite to enable a court of common law to apply its power to them; *Van Norman v. Circ. Judge etc.*, 6-663.

2. LEVY ON SHARES. Shares of stock in corporations are intangible entities, incapable of seizure by the methods of the common law. In the absence of some specific statute, affording means of subjecting them to process, the only safe proceeding against them is in equity. *Id.*

3. —. Statutes subjecting shares of stock to execution or attachment are in derogation of the common law; *Nabring v. Bk. of Mobile*, 6-124.

4. —. Shares of stock are choses in action. As such, they were not liable, by the common law, to levy and sale under execution; nor will they be so liable by a statute which provides for a levy on personal property of a defendant, except things in action and an equity of redemption. *Id.*

5. —. Attachments and executions can not be levied on shares of stock, as property of a debtor, such shares standing, on the corporate books, in the name of another, regularly assigned and transferred within the knowledge of the company; *Van Norman v. Cir. C't Judge etc.*, 6-663.

6. LEVY ON SHARES PLEDGED. Shares of stock pledged or mortgaged, or in like situation, are not subject to execution sale, unless by express words of statute. *Id.*

EXEMPLARY DAMAGES; see DAMAGES.

EXPRESS COMPANY.

1. **IS A COMMON CARRIER.** One whose business is, for hire, to take goods from the custody of their owner, assume entire possession and control of them, transport them, from place to place, and deliver them at a point of destination to consignees or agents there authorized to receive them, is a common carrier, nevertheless he styles himself an express forwarder and although he contracts with others to transport the goods in vehicles of which he is not the owner and the movements of which he, himself, does not manage or control. Such is an express company; *Christensen et al. v. Amer. Expr. Co.*, **3-504**.

2. —. Express companies, engaged in the carriage of goods, wares and merchandise and the great staples and products of the country, are common carriers; *South. Expr. Co. v. Crook*, **3-118**.

3. —. An express company is to be regarded as a common carrier and its responsibilities for the safe delivery of the property intrusted to it, are the same as that of the carrier; *South. Exp. Co. v. M'Veigh*, **4-207**.

4. **AS FORWARDER.** That an express company designates itself "express forwarders" and that it agrees to "forward" the goods intrusted to it, does not, necessarily, give it the character of simple forwarder, nor prevent it from being treated as a common carrier; *Christensen et al. v. Amer. Expr. Co.*, **3-504**.

5. **THEIR DUTY GENERALLY.** The ordinary undertaking of an express company is to make personal delivery of packages, received by it for transportation, to the consignees, or their agents, if they can be found by the exercise of reasonable diligence at the place to which any package is addressed. The duty is not performed, nor the liability changed, from that of common carriers to that of warehousemen, by giving notice to the consignee that a package addressed to him has arrived and awaits his order. In this its obligation differs from that of a carrier by rail or water. The consignee of a package is not bound to call for it, but the company, by its agents, must make reasonable inquiry to find and deliver a package addressed to him; *Witbeck v. Holland*, **4-536**.

6. —. The general duty, imposed upon express companies, of using care and diligence in the custody and transportation of property involves the obligation of employing suitable agents. Whether or no the company has done this is to be judged with reference to the nature of the service and the circumstances under which that service is to be performed. If special skill or capacity be required to accomplish the undertaking, it is negligence to employ an agent not having the necessary qualifications; *Holladay v. Kennard*, **3-91**.

7. **DUTY AS TO DELIVERY.** Personal delivery of a package is one of the duties of an express company, as a carrier; *Adams Exp. Co. v. Darnell*, **3-289**.

8. **DUTY AS TO DELIVERY.** The carrier's duty to deliver and that of the consignee to receive are reciprocal. When the consignee has knowledge of the arrival of a package and the express company, as carrier, is ready to deliver in completion of its contract, but is prevented from delivering by the absence of the consignee, the liability of the company, as common carrier, or insurer, is discharged. Thenceforth, its liability is that of a bailee or warehouseman, for such reasonable care of the property as prudence would require. *Id.*

9. **DELIVERY OF CONSIGNMENT.** A usage, upon the part of an expressman, to leave packages at a particular place and to substitute a notice of the arrival of the goods there for a personal delivery, must be proved to have been within the knowledge of the consignee at the time of making the contract of consignment, in order to be binding upon him; *Packard v. Earle et al.*, 5-446.

10. **LIABILITY; LOSS OF GOODS.** Where a person forwards goods by an express company, and they fail to arrive at their destination, and the carrier does not show the manner of their loss, the presumption arises against the company of want of ordinary care. The carrier alone has power to show what has become of the goods, or why they were not duly delivered, and the means of tracing them, from the moment of their shipment. The shipper can only show that he delivered them safely to the carrier, hence the burden is on the carrier to show the use of reasonable care, notwithstanding a stipulation on its part that it is only to be held for gross negligence; *Adams Expr. Co. v. Stettaners*, 4-358.

11. **LIMITATION OF LIABILITY.** As a common carrier, an express company may modify or limit, its common law liability, by special agreement with the owner of the goods, but it will not be permitted to so modify or limit such liability as to exonerate itself from liability for its own negligence or the negligence of the agent employed by it to perform the transportation. Notwithstanding the special agreement, it will be responsible for the want of ordinary diligence; *Christensen et al. v. Amer. Exp. Co.*, 3-504.

12. —. An agreement with an express company, as a common carrier of small parcels, that the company shall not be held liable for any loss or damage, whatever, to a package delivered to it consigned to a point not far distant (in this case but about a day's journey), unless claim should be made therefor within ninety days from the date of delivery to the company, held, to be reasonable and one which the company was authorized to make; *Express Co. v. Caldwell*, 5-102.

13. —. As common carriers, express companies may reasonably limit their liability by special contract, but public policy will not permit such companies, in this way, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves or servants; *Southern Exp. Co. v. Crook*, 3-118.

14. **LIMITATION OF LIABILITY.** General notices in regard to the liabilities of carriers are of no avail, unless reduced to the form of special stipulations and signed by the party sending the goods, or brought home to his knowledge, and be, also, in the opinion of the court, before whom the case shall be tried, just and reasonable. *Id.*

15. —. In the absence of any allegation calling in question the fairness and binding force of a special contract for transportation, it must be regarded as obligatory. It was therefore held that an instruction asked that "if the jury believe, from the evidence, that the parties agreed that the company was not to be held responsible for loss or damage, unless the same was caused by the fraud or the gross negligence of the defendant, before the plaintiffs can recover in this action they must prove to the satisfaction of the jury such fraud or negligence" was improperly withheld; *Adams Exp. Co. v. Loeb & Bloom*, 3-344.

16. —. In the absence of fraud or imposition, the rights of carrier and shipper are controlled by a contract in writing, delivered to the shipper by the carrier, at the time of the receipt of property for transportation. The same rule applies to an express company, and the exemption may extend to losses occurring through negligence. Such a contract is valid in New York. A contract, however, will not be so construed as to exempt the company from liability; the exemption must be clearly expressed; *Magnin et al. v. Dinsmore, pres. etc.*, 4-617.

17. —. A bill of lading contained various stipulations printed underneath the receipt for goods, one of which was that the express company shall not be liable beyond the sum of \$50, at which the goods forwarded should be valued, unless otherwise therein expressed, or unless specially insured, and so specified in the receipt. Provisions like this annexed to the receipt, in a bill of lading, do not release the company, as a common carrier, from its common law liability, unless the assent of the shipper to such limitation is shown. Such assent is not necessarily to be presumed from the acceptance of the bill of lading; *Adams Exp. Co. v. Stettaners*, 4-358.

18. **CONNECTING LINES.** An express company having received a package, which it agreed to "forward" to a point off its line and beyond the terminus of its route, not receiving through charges and the contract expressly limiting its liability to that of forwarders, the liability of the company as a common carrier ceases upon the safe arrival at the end of the company's route and its delivery in good order, with proper instructions, to another responsible carrier who undertakes to transport it to the consignee, at the point of destination. The meaning of the word "forward" as used in the contract is "to send" and not "to carry"; *Reed v. U. S. Exp. Co.*, 4-564.

19. **NEGLIGENCE.** The package was consigned to Memphis,

and not received by the consignee. No explanation of the non delivery was shown by defendant company. It was shown that, some months after the shipment and within a year, the box in which the goods had been shipped was picked up near Gowanus, on the East river shore, empty. These facts warranted the submission to the jury of the question of negligence; *Magnin et al. v. Dinsmore, pres. etc.*, 4-617.

20. CONTRACT CONSTRUED. A shipment of the value of \$1,500 under a contract which provided: "It is further agreed and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned, for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever, unless specially insured by them, and so specified in this receipt; which insurance shall constitute the limit of the liability of the Adams Express Company, in any event; and if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding \$50 for the loss, or destruction of, or damage to, the property aforesaid." Held, such contract does not include losses occurring through or by reason of the company's negligence, and to such losses the \$50 clause does not apply. *Id.*

See COMMON CARRIERS.

EXPULSION OF MEMBERS.

1. POWER IN CORPORATION. When a corporation is duly organized it has power to make by-laws and expel members, though the charter be silent on that subject; *Dickenson v. Chamber of Commerce*, 4-229.

2. —. If the power of expulsion be granted in general terms, it is conferred to enable the corporation to accomplish the objects of its creation and is limited to such objects and purposes. It seems to be, well settled, that when the corporate charter is silent on the subject of expulsion, or grants the power in general terms, there are but three lawful causes of disfranchisement: (1) offenses, of an infamous character, indictable at common law; (2) offenses against the corporator's duty, to the corporation, as a member thereof; (3) offenses compounded of the two.

3. NOTICE NECESSARY. A legal member of a corporation can not, without notice, be removed for the non payment of dues; *Diligent Fire Co. v. Commonwealth*, 5-613.

4. VIOLATION OF BY-LAW. A by-law which provides that a member who shall wilfully violate the constitution and by-laws, or be guilty of fraudulent breach of contract, or of any proceeding inconsistent with the just and equitable principles of trade, or other misconduct, is not infringed by a refusal to pay an award of a committee, when the party against whom the award is made is and has

been respectfully protesting against the jurisdiction of the arbitrators and demanding an appeal. A suspension in consequence is not warranted; *Savannah Cotton Exch. v. State of Georgia, ex rel.*, 6-342.

5. **PRESUMPTION.** If one be cited, upon complaint made, before a committee of his association, which committee claims to be regular and is not shown to be otherwise, and he appears before such committee, he is bound then and there to present any formal objections he may have to such investigating committee. The court will presume that if the proceedings before the committee were not according to the usages of the society, the society would not, after notice, sanction such proceedings. At any rate this court is no place in which to review such routine questions; *People, ex rel., v. St. George's Soc.*, 4-480.

6. **JURISDICTION OF COURTS.** Courts will not review and set aside proceedings of a society, taken under the authority of its articles of association, assented to by its members, for the expulsion of a member upon notice of charges presented and a hearing, according to the by-laws, either because the charges were insufficient or the proceedings irregular, unless injustice has been done which the party charged, tried and expelled could not have objected to in the society or committee meeting. *Id.*

7. **CONSTRUCTION OF PROCEEDINGS.** Proceedings to expel a member under charges presented, notice given and a hearing afforded, in conformity with articles of association agreed to by all the members, are to be considered without too much regard to any technicalities; substantial justice is to be followed rather than form. *Id.*

8. **REMEDY.** A court of equity will not entertain a bill by a member of a private corporation, against such corporation and its officers to restrain them from expelling him for a violation of its by-laws and rules. The remedy, in such case, if any there be, is in a court of law; *Sturges v. Board of Trade*, 6-401.

See **BY-LAWS**; **BOARD OF TRADE**; **CHURCH ORGANIZATION**; **MANDAMUS**.

F.

FALSE REPRESENTATIONS.

1. **INDUCING SUBSCRIPTION.** Semble, that a stockholder can not defeat an assessment, on his stock, by evidence that he subscribed to the stock in reliance on representations, of a corporate agent, that certain persons, in whom he had confidence, were stockholders, such persons not being, in fact, bona fide stockholders; *Choctaw Ins. Co. v. Floyd*, 8-283.

2. —. In an action by an assignee in bankruptcy of an acting corporation, to recover unpaid subscriptions for its stock, the

defense of false and fraudulent representations, inducing the subscription, can not be set up; *Chubb v. Upton*, 6-23.

3. INDUCING SUBSCRIPTION. If the representations are as to matters controlled by the charter, the subscriber is, in law, bound to know the agent has no right to make representations inconsistent therewith; wherefore, they will not avoid the subscription. As to matters not controlled by the charter, false and fraudulent representations, which come within the limitations, and by which one has been entrapped into a subscription, will avoid the contract, in the same manner as fraud vitiates contracts of every character; *Selma, M. & M. R.R. Co. v. Anderson*, 8-27.

4. —. To avoid a subscription, on the ground of false representations of an agent, it must be shown that the statement was not uttered as an opinion, but as an ascertained and existing fact. It must not only be false in fact, but must, also, be either known so to be by the party uttering it, or his position must be one that made it his duty to know the truth. The resisting subscriber must show that he acted on such statement, that his own position was such as warranted him in so acting, and that the statement was as to a fact material to the question of his subscription. *Id.*

5. —. A statement on the part of an agent of a corporation, soliciting subscriptions, as to the pecuniary condition and prospects of his corporation, will not avoid a subscription, unless the falsity and fraud of such representations are clearly shown and unless it is manifest that the condition of the enterprise constituted a material inducement to the subscription. *Id.*

6. INSTANCE. The property of a corporation was incumbered by a trust deed. The trustee released a portion of the property, agreeing to look, only, to the portion thereof not released, for payment. This release was recorded. The corporation obtained subscriptions to its stock on the assurance that there was no incumbrance on the property, so released, and a subscriber for stock relied on this assurance. In an action to recover on his subscription, such subscription was held to have been obtained by such misrepresentation as avoided it; *Water V. Manuf. Co. v. Seaman*, 8-32.

7. MODE OF ISSUE. One who accepts and holds certificates for unpaid shares of stock and votes such shares, at annual elections, is estopped from denying his liability as a stockholder, although such shares were issued to him under a written agreement that they were to be held in trust, or as security only, and were not subscribed for on the books of the company, or otherwise, in the usual manner of making such subscriptions; *Griswold v. Seligman*, 8-247.

8. BY DIRECTOR; LIABILITY. A director of a corporation who knowingly issues, or sanctions the circulation of a prospectus containing false statements as to material facts, the natural tendency of which is to deceive and to induce the public to purchase the

corporate stock, is liable for the damages sustained by one who, relying upon and induced by the statements, makes such a purchase, and an action can be maintained where the false statements were one, although not the sole, inducement to the purchase; *Morgan v. Skiddy et al.*, 5-567.

9. BY DIRECTOR; LIABILITY. The mere fact that a trustee allows his name and credit to be used to float the stock of a corporation which, afterward, turns out to be worthless, in the absence of evidence of knowledge on his part or that he has made or sanctioned any false representation, does not constitute actionable fraud. *Id.*

See DECEIT; SUBSCRIPTION TO STOCK.

FERRY COMPANY.

1. FRANCHISE AND DUTY. The franchise to own and operate a ferry is granted upon the consideration that it is for the public good and convenience, and not for the individual profit of the keeper. The grantee, who accepts the trust, is so burdened, on his part, with the duty of providing suitable means of transportation, that the traveling public shall be accommodated at all reasonable hours, without unreasonable delay; *Jabine & Woodruff v. Midgett*, 3-124.

2. NATURE F. A ferry franchise can not be held and conveyed as individual property, absolute and separate from the real estate. Such franchise is a grant from the state and is subject to regulation by the proper authorities for the public good; *Haynes, adm'r, v. Wells*, 4-270.

3. HOW LIMITED. In Arkansas, the right of a ferry license is limited, by statute, to the owner or party, rightfully in possession of the land on the river. *Id.*

4. EXCLUSIVE PRIVILEGES. The establishment of a ferry across a river does not vest, in the owners of the franchise, the exclusive privilege of transporting persons and property, for hire, across such river, but the legislature may authorize, as it may deem proper, other means of crossing, having in view the convenience of the public, increase of travel, etc.; *Piatt et al. v. Cov. & Cinc. Bridge Co.*, 4-401.

5. DEATH OF GRANTEE. In Iowa the general law regulating ferries provides that the board of supervisors has power to grant ferry licenses as may be needed within its county. Held, that such a license is not vacated, nor the franchise lost, by the death of the person to whom it was granted, but passes to his representatives; *Lippencott v. Allander et al.*, 3-317.

6. LIABILITY AS COMMON CARRIER. Ferry-men are common carriers, and are regarded, in law, as insurers of the property committed to their care, and are responsible for all losses or damage to it, which do not come within the excepted cases of the act of God and the public enemy; *Harvey v. Rose*, 3-125.

7. **DUTY; BURDEN OF PROOF.** As a common carrier a public ferryman is compelled to receive all goods and property offered to him for transportation, and when he has received property for that purpose, the presumption is that it is in his charge as a common carrier and the burden is upon him of showing that he has not had such control over it as invests him with the character of a common carrier in respect to it. *Id.*

8. **MEASURE OF RESPONSIBILITY.** The mere fact that the goods are accompanied by the owner does not modify or diminish the responsibility of the ferryman. To reduce his liability it must appear that the owner did not intrust the ferry with the care, but retained exclusive control himself. If in such case the owner, by his own negligence or wilful wrong, contributed to the loss, so that but for it the loss would not have happened, he will not be entitled to recover, except where the direct cause of the loss is the omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such neglect. *Id.*

See **COMMON CARRIER.**

FIRE INSURANCE COMPANY; see INSURANCE COMPANY.

FOREIGN CORPORATION.

1. **DEFINED.** A foreign corporation is a corporation created by, or under the laws of any other state, government or country; *Daly et al. v. Nat. Life Ins. Co., etc., 7-87.*

2. **CORPORATION CREATED BY CONGRESS.** A corporation created by legislation of congress is a foreign corporation in a state. Such corporation is a body politic of the District of Columbia. *Id.*

3. **FOREIGN CHARTER.** Where a question arises as to the right to exercise any power or to avail of any privilege claimed to be possessed and exercised by a foreign corporation, it is essential that the law, or charter, of the creation of such corporation should be produced that the franchises bestowed on the company may be known and the measure of its powers ascertained; *Chapman v. Colby et al., 7-578.*

4. **SUBJECTION TO THE LAW OF HABITAT.** A foreign private corporation can not establish a liability upon any act done by it as a consideration for a benefit to itself if such act be such an one as is forbidden to be performed by domestic corporations; unless by express authority of law. *Id.*

5. **PROOF OF EXISTENCE.** It is not error, on the part of a trial judge, to exclude a certified copy of articles of incorporation purporting to be in pursuance of the general laws of a sister state, the same not being accompanied by proof of the enabling statute and not being properly certified and authenticated, either under the laws of the state in which the cause is pending, or of the United States; *French et al. v. Donohue, 9-489.*

6. **EXERCISE OF CORPORATE FRANCHISES.** No state has power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises in other states. It may confer powers in the nature of a commission, to be exercised anywhere upon condition that their exercise be assented to by the state or sovereignty where it may be sought; but without this assent, express or implied, such powers would be nugatory outside of the state granting them. Each state, by its own legislature, must determine for itself all such questions of public policy arising within its own limits; *Thompson v. Waters*, 4-458.

7. **EXERCISE OF FRANCHISE.** A foreign railroad corporation possessing a railroad which is partly in the state of Ohio and partly in an adjoining state, may exercise and enjoy, within the state of Ohio, all its powers, privileges, faculties and franchises, for the purpose of such railroad and its business, not inconsistent with the laws of the state; *State of Ohio, ex rel., v. Sherman et al.*, 4-28.

8. **COMITY.** Upon the principles of comity, the corporations of one state are permitted to do business in another unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. The state must determine for itself, when the public good requires that its implied assent to the admission shall be withdrawn; *Pensacola Tel. Co. v. Western Tel. Co.*, 6-48.

9. **RULE OF COMITY.** The rule seems to be generally and well settled, that the corporate existence, rights of making and enforcing contracts, of acquiring property and transacting business (not requiring the exercise of official corporate action or franchises within the state) of a corporation created by the laws of one state will be recognized and protected in another, subject only to the qualification that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the state in which they are sought to be enjoyed or exercised, or prejudicial to the interest of such state or its citizens; *Thompson v. Waters*, 4-458.

10. **COMITY.** In the absence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts presume the tacit adoption of them by their own government, unless repugnant to its policy or interests. Each state, within the limit of the rule, will recognize those corporations enacted into being by the legislatures of other jurisdictions and allow access to its tribunals for a remedy on all legal contracts; *Williams v. Cresswell et al.*, com'rs, 8-23.

11. —. Foreign corporations may, by the comity of nations, make contracts in other states and establish agencies there, unless

excluded from so doing or unless against the policy or interest of the state. *Id.*

12. **COMITY.** When it is claimed that a foreign corporation can not make a contract in a state other than that of its creation and habitat, which contract is lawful in itself and within the scope of its corporate powers, the court must be referred to some positive rule declaring a prohibition, or regulating the right. *Id.*

13. —; **WHAT ARE NOT CORPORATE ACTS.** The courts differ as to what are corporate acts. In this instance, the acts of a foreign corporation in acquiring property in this state, in giving notes and mortgages for the same, and in selling corporate property in this state to pay such notes and mortgages, are not considered corporate acts, but such acts as may be done by the directors in the exercise of their powers as agent of the corporation; *Reichwald v. Com'l Hotel Co.*, 10-203.

14. **UNLAWFUL CHARACTER NOT PRESUMED.** Courts can not assume a sister state would allow a treasonable corporation to exist under its authority; *Importing & Exporting Co. v. Locke et al.*, 5-135.

15. **ABILITY TO ACT AWAY FROM HOME.** A corporation can not change its residence, or its citizenship. It can have its legal home only in the place where it is located, by or under the authority of, its charter; but it may, by its agent, transact business anywhere, unless prohibited by its charter or excluded by local law; *Ex parte Schollenberger et al.*, 6-59.

16. **MAY EXERCISE POWERS IN ANOTHER STATE.** A corporation created in one state may, upon the principle of comity, exercise within another state the general powers conferred by its own charter, and permitted by the law of its own state, provided that the doing so be not inconsistent with the laws or public policy of such other state; *Santa Clara Female Academy v. Sullivan*, 10-298.

17. **POWER TO CONTRACT IN ANOTHER STATE.** A corporation formed under the laws of another state has the power to make contracts and acquire and transfer property in this state the same as a natural person, and, unless prohibited, may borrow money and give security upon the corporate property for its payment the same as an individual may do; *Reichwald v. Commercial Hotel Co.*, 10-203.

18. —. A corporation can not perform acts outside of the state under which it is created, which are strictly corporate acts, but may perform other acts not corporate in the strict sense of these words. *Id.*

19. **TELEGRAPH COMPANIES.** The congress of the United States, having under the commercial clause of the federal constitution, exercised its power to regulate commerce between the states, in respect to the construction of lines of telegraph, a state can not directly, nor by indirection, exclude a foreign telegraph company

from doing business within its limits; but, by the legislation of congress, in this regard, only national privileges are granted; *Amer. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

20. **PRE-REQUISITE OF BUSINESS.** The statute of Nevada (Stats. 1869, 115), require all foreign corporations to file, in the recorder's office of each county in which they carry on business, an authenticated copy of their certificate, or act, of incorporation with a certified list of officers. The obvious intention is to compel such corporations to furnish easily accessible evidence of their existence and the names of their officers. In the absence of some showing to the contrary the court will presume such papers have been filed, as required by law; *Evans v. Lee*, 8-338.

21. **POWER TO CONTRACT.** Although a corporation must live and have its being in that state only by and in which it is created, it does not by any means follow that its existence will not be recognized in other places. Its residence in one state creates no insuperable objection to its power of contracting in another. Its existence as an artificial person in the state of its creation may be acknowledged and recognized by the law of the nation where the dealing takes place, and it may be permitted, by the laws of that place, to exercise there the powers with which it is endowed; *Martin & Merriwether v. Mobile & Ohio R.R. Co.*, 3-339.

22. **POWER OF STATE OVER.** Corporations created in one state are not citizens of another state, within the meaning of the federal constitution, and the various state legislatures have the power to impose conditions upon which corporations chartered beyond the state may do business within its territory. Nor is this power limited or changed by the fact that the charter of the foreign corporation declares it may do business in other states. Such a provision could only operate as an authority, to the company to do so, on such terms as other states might prescribe; *Cincinnati Mut. Health Ass. Co. v. Rosenthal*, 3-263.

23. **LIABILITY FOR CONTRACTS.** Where a corporation organized in another state sought and obtained permission of the legislature of New York to continue its line in to and transact business in that state, it must be deemed, as to its contracts there made, to possess the powers and be subject to all the liabilities of similar corporations created by the state of New York. It should not be permitted to make a contract valid in New York and then, when its interests dictate, set up the decision of the state of its creation, holding a want of power, as an excuse for its violation; *Milnor v. N. Y. & N. H. R.R. Co.*, 4-597.

24. **BOUND BY ACTS OF OFFICERS.** A foreign insurance company doing business in this state is bound by the acts and contracts of its president and general agents here, in respect to persons in this state dealing with such corporations, when such acts are within the powers of the company or the scope of the apparent power of the officer acting, notwithstanding under the private rules and

regulations of the company such officer or agent has no power to make such contracts; *Union Mut. Life Ins. Co. v. White*, 10-191.

25. **ENFORCING LIABILITIES.** As corporations can act only in conformity with the law of the state by which they are created, such corporations are responsible only to the extent and in conformity to the law of the state where the contract is made or the duty undertaken, and it will make no difference whether the action is in form *ex contractu* or *ex delicto*. This is in conformity to the general rule of law upon this subject of contracts and torts; so, where a railroad corporation is sued out of the jurisdiction by which it was created and under whose laws alone it can act, the extent and degree of its responsibility must be determined by the law of the place of the existence and action of such corporation; *N. Orl. etc. R.R. Co.*, 8-14.

26. **CONTRACTS ENFORCED BY COMITY.** A corporation, created in one state, can not exercise its functions in another state, or a different sovereignty, without permission, express or implied. The comity thus extended to corporations is the voluntary act of the state or nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests; *Carroll v. City of E. St. Louis*, 5-208.

27. **ENFORCEMENT OF FOREIGN LAWS.** In the absence of any positive law affirming, denying or restraining the operation of a foreign law, courts of justice presume its tacit adoption, by their own government, unless they are repugnant to its policy or prejudicial to its interests. *Id.*

28. **TENURE OF REALTY.** Where a foreign corporation is authorized to take lands by its charter, under certain circumstances, a taking within its powers, in a state not of its creation, will, in the absence of local law to the contrary, be held valid, by rule of comity; *Chapman v. Colby Bros. & Co.*, 7-578.

29. **ACQUIRING TITLE TO REAL ESTATE.** A corporation created by the laws of another state, which, by the laws of such state, can not there acquire and hold title to real estate by devise, is incapable of acquiring title to real estate, by devise, in this state (Illinois); *Starkweather et al. v. Am. Bible Soc.*, 5-282.

30. **ACQUIRING PROPERTY.** A foreign corporation can not take and hold real estate in Illinois beyond the quantity necessary for the transaction of its business, or the collection of its debts, whether for its own benefit or in trust for others; *U. S. Trust Co. v. Lee*, 5-300.

31. **IN TRUST.** A corporation created by the laws of New York, with power to act as trustees in carrying out the provisions of a will devising real estate, being, by the courts of that state, appointed trustee to hold, have charge of and manage real estate in Illinois, on a bill filed in Illinois by such corporation for a like appointment there, held, it could not hold real estate in trust in the state and that the bill was properly dismissed. *Id.*

32. **IN TRUST.** The American Bible Society being incapable, under the laws of the state of New York, where it was incorporated, of acquiring title to real estate by devise, can not acquire title to real estate in Illinois by devise; and real estate devised to it in that state is intestate estate, and descends to and vests in the heirs of the testator; *Starkweather et al. v. Am. Bible Soc.*, 5-282.

33. **TENURE OF LAND IN ILLINOIS.** The Connecticut Land Company was incorporated by the general assembly of the state of Connecticut, with a capital stock of \$200,000 and the privilege to increase it to half a million. The corporation was empowered to receive, grant, convey, dispose of and transfer real estate, to manage and control the same, as well as necessary personal property, and to sell and exchange as might seem necessary to carry on the business. The company was empowered to adopt by-laws, not in conflict with its charter or the laws of Connecticut. There was nothing in its charter compelling sale of property which might be acquired, within any fixed period. It invested its capital in lands of Illinois, and conveyed one or more lots to the city of East St. Louis. In an action of ejectment by the city to recover possession of the lot, held, that the corporation took no title by its attempt to purchase, hence it could transmit none to the city; *Carroll v. City of E. St. Louis*, 5-208.

34. **TENURE OF PROPERTY.** A foreign corporation, under the present laws of Ohio (1873), can hold property in the state, and sue and be sued in her courts; *Hanna and Finley v. International Petroleum Co.*, 5-593.

35. **ACQUISITION OF REAL ESTATE.** The supreme court of Illinois was clearly in error in holding it to be shown, by the first section of its general law regulating the incorporation of associations, that it was part of the policy of the state that corporations should not be formed in the state for the business of loaning money (*U. S. Mortgage Co. v. Gross*, 93 Ill. 483). The court, also, erred, in that case, in holding that the first sentence in the same section manifests a policy that foreign corporations were to have no right to loan money in the state. Indeed, the general incorporation law of the state was not designed to prevent corporations from taking mortgages on real estate as security for debts, and it would seem that the right to take such security, by the policy of the law of the state, may be regarded as an incident to the right to create a debt; *Stevens v. Pratt et al.*, 9-85; *Commercial Un. Assur. Co. v. Scammon*, 9-85, note.

36. **STATUTE CONSTRUED.** The clause in the general incorporation law of Illinois, of 1872, that (Cothran's stat., 326, § 1) "corporations may be formed in the manner provided by" that act, "for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money," was not intended to, and does not, by implication, prohibit the formation of corporations for the purposes so

excepted, under other acts. It only prohibits their formation under that act; and, therefore, does not show that such corporations are prohibited by the policy of the law. So, it neither grants the right nor prohibits the doing of business in the state by foreign corporations. It is simply a law imposing regulations and restrictions, and its meaning is that when the general laws of the state provide for the organization of corporations, foreign ones of like character doing business in the state shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties. *Id.*

37. CORPORATIONS NOT PROVIDED FOR. The failure to provide for the organization of other domestic corporations than those named in the general law on the subject, is not an exclusion of foreign corporations of like character. The excepted corporations, and foreign corporations of like character, are simply unaffected by the general law of 1872; and as the formation of such corporations in the state is not prohibited, there is no prohibition of foreign corporations of the same character from doing business in this state. *Id.*

38. STATE POLICY; HOW EVIDENCED. The policy of a state not to permit the transaction of business in its limits by foreign corporations, or to allow such corporations to acquire and hold real estate, must be expressed in some affirmative way. It can not be inferred from the fact that the legislature has made no provision for the formation of similar corporations. *Id.*

39. INSTANCE. A loan made by a foreign corporation, in 1873, to a citizen of Illinois, secured by a mortgage, given at the time, is not void as being prohibited by any legislation of the state, or contrary to public policy, and such mortgage may be foreclosed, and pass the title to real estate. *Id.*

40. —; MAY HOLD REAL ESTATE. Corporations organized under the laws of another state purely for educational purposes, which have under their charter, or the laws of the state of their creation, power to hold real and personal property, may take and hold real estate in this state by devise, to the extent of their capacity in the state of their creation; *Santa Clara Fem. Acad v. Sullivan*, 10-298.

41. —; TAKING BY DEVISE. The power conferred by law upon a corporation to acquire real estate is broad enough to enable it to take by devise. *Id.*

42. RIGHT TO HOLD REAL ESTATE ACQUIRED BY DECREE. A foreign corporation, in whose favor a decree is rendered, may, in Indiana, hold and convey real estate purchased under a decree, there being neither a prohibitory statute nor a statute granting such right; *Elston v. Piggott*, 10-313.

43. CAN NOT EXPROPRIATE PROPERTY. The statute of Iowa (revision, § 1314), authorizes the proceeding for condemnation and assessment, of damages for the taking of property for the right of

way for railroads, to be instituted only for or against a railroad corporation in the state, organized under the laws of the state. A foreign corporation can neither exercise the power under the right to condemn, or enjoy it if acquired; *Holbert v. St. Louis, Kansas Central & Nebraska R.R. Co.*, 6-531.

44. **LIABILITY TO SUIT.** Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation and can not migrate to another state. They are, however, liable to be sued like natural persons, in transitory actions, arising *ex contractu* or *ex delicto*, in any state, where legal service of process can be had. Where defendant in the court below appeared and pleaded to the action it can not object to the jurisdiction and it is quite too late, after general issue pleaded, to raise the question of the authority of the court finally to dispose of the case; *N. O., J. & G. N. R.R. Co. v. Wallace*, 8-14.

45. **LIABLE TO SUIT.** Foreign corporations doing business in Illinois are liable to suit, as in the case of domestic corporations or citizens, and process may be served upon their agents in the state. The word "process," in the practice act, embraces process of every kind, including process of garnishment; *Hannibal & St. Joe R.R. Co. v. Crane*, for use of etc., 9-111.

46. **LIABLE TO GARNISHMENT.** A foreign corporation doing business and having property in the state of Illinois is liable to garnishment, as is a domestic company, and service of process may rightfully be made on the agent of such corporation within the state. *Id.*

47. **ACTION AGAINST.** A debt due from a foreign corporation to one of its employes residing in the same state, payable by its treasurer, is not local, nor is the action to recover on the same a local action, to be brought in such state. Neither is any demand necessary in this state to authorize an action in the courts of Illinois for its recovery. *Id.*

48. **DOMESTIC CORPORATIONS FOR PURPOSES OF SUIT.** Foreign corporations having complied with the requirements prescribed (before they may transact business in a state other than that of their creation) prosecute their business with the assent of the state, and subject to the conditions upon which that assent is given, and having voluntarily brought themselves within the provisions of a statute, submitting to the exclusive jurisdiction of the state, are to be regarded and treated, for purposes of suit, as corporations of the state; *N. Y. Life Ins. Co. v. Best et al.*, 4-49.

49. **RIGHT TO SUE.** As a general rule, a foreign corporation may, with safety and propriety, be allowed to prosecute a suit when the corporators, themselves, would be permitted to do so; *Importing etc. Co. v. Locke*, 5-135.

50. **SUIT BY.** Foreign corporations may sue each other in this state (Michigan) if both are doing business within the state and

the cause of action arise here; *Emerson, Talcott & Co. v. M'Cor-mick Harv. Mach. Co.*, 10-614.

51. **CORPORATE EXISTENCE.** Where a foreign corporation is sued in a state not of its residence, by exhibiting certificate of its incorporation duly and properly authenticated, it answers a claim that its stockholders are liable as members of an unincorporated association, and in a proceeding by an individual—a person other than the government which created it—there can be admitted no proof aliunde the certificate to impeach corporate existence; *Lafin & Rand Powder Co. v. Sinsheimer et al.*, 7-375.

52. **STANDING IN COURT.** A corporation created under and by virtue of the laws of one state has a right to sue and stand in judgment in the courts of a state other than that of its creation; *Life Ass'n of America v. Levy, etc.*, 7-264.

53. —. A foreign corporation which, at the date of the commencement of suit in its behalf, has not complied with the requirements of a statute providing for submission to suit within the jurisdiction, etc., is not competent to proceed; its action is prematurely brought; but its contracts are not void; *Daly et al. v. Nat. Life Ins. Co. of U. S.*, 7-87.

54. **INSOLVENT.** An assignee, or trustee, appointed under the law of a sister state, to take charge of the assets, collect the debts, etc., of a dissolved, or insolvent, corporation of such sister state, may sue a debtor of the corporation in a state other than that which created the corporation; *Life Ass'n of America v. Levy, etc.*, 7-264.

55. **WHERE SUED.** In respect to corporations chartered in another state, and having their principal officers and place of doing business in such state, they are foreign corporations; and where the contract and cause of action arising therefrom arose in such other state, the corporation can not be sued thereon in this state; *Central R.R. & Banking Co. v. Carr*, 10-35.

56. —. Whether, where a railroad incorporated in one state, and extending its business into another, makes a contract to be partly performed in each state, suit for breach of such contract can be maintained in the state where the corporation is simply permitted to do business, is not decided. *Id.*

57. **INSURANCE COMPANY; MASSACHUSETTS.** Every foreign insurance company doing business in Massachusetts is required to appoint a citizen and resident of the state its general agent, upon whom all lawful process sued out by the citizens of said state against the corporation may be served with like effect as if the corporation existed in this state; *Folger v. Columbian Ins. Co.*, 3-387.

58. **CONDITIONS OF TRANSACTING BUSINESS.** An act of the state of Ohio provides that foreign corporations, transacting the business of life insurance, shall be allowed to carry on their business within the state, upon the fulfillment of certain conditions, among

which, that they shall submit to the exclusive jurisdiction of the courts of the state as to contracts entered into within it. Held, that this is a lawful condition, to be enforced on the part of the state, and not in violation of the clause of article 3, section 2 of the constitution of the United States, which provides that the judicial power of the United States shall extend to controversies between citizens of different states; *N. Y. Life Ins. Co. v. Best et al.*, 4-49.

59. **ESTOPPEL.** Where a paper has been filed, under a statute and in attempted compliance therewith, and it is shown to have been filed as a corporate act, the foreign corporation and those claiming under it are precluded from objecting to the contents of that paper as, at least, *prima facie* evidence, upon the ground that it does not come up to the requirements of the law; *Evans v. Lee*, 8-338.

60. **USUAL PLACE OF BUSINESS, FOR SERVICE OF PROCESS.** A corporation, created by the laws of another state, which has an office in this state, for the convenience of its stockholders and for the better management of its finances and other business, where its principal officers are to be found and where it carries on such business as is usually carried on in the office of the president and treasurer of such corporation, has a usual place of business in this state, within the meaning of a statute (Stat. of Mass., 1870, ch. 194) which renders amenable to trustee process, corporations established under the laws of other states and having usual places of business within the commonwealth, and may be summoned, as trustee, by process upon its treasurer; *Nat. Bank v. Huntington et al.*, 7-524.

61. **SERVICE OF PROCESS ON.** Compliance with the terms of a general statute authorizing and prescribing the mode of the service of process on foreign corporations (Rev. Stat., Mo., 1879, § 3489, subd. 4) has like effect with the service of process upon an individual and gives the proper court jurisdiction to enter a general judgment; *M'Nichol v. U. S. Merc. Rep. Agency*, 8-288.

62. —. The legislature has power, under the constitution of Missouri, to pass an act authorizing service of legal process upon any non resident corporation having an office or doing business within the state by leaving the same with an agent of the corporation within the state and authorizing the rendition of a general judgment upon such service. *Id.*

63. —; **SERVICE OF PROCESS.** In Alabama the statutory provisions authorizing the service of process in actions against corporations on certain designated officers, or in case of non residents, on any white person in the employment of the company, do not authorize suits against foreign corporations excepting on causes of action originating in this state, or on contracts entered into with reference to a subject matter within this state; *Cent. R.R. & Banking Co. v. Carr*, 10-65.

64. **SERVICE OF PROCESS ON.** A foreign corporation doing business in the state of Georgia is subject to the jurisdiction of the courts of that state if it can be served with process; and, as by the law of that state, any corporation may be served with the process of a court having jurisdiction of the suit, by serving "any officer or agent of such corporation," so any foreign corporation having an officer or agent in the state, may be served by serving its officer or agent; *City Fire Ins. Co. v. Carrugi*, 4-333.

65. **SERVICE OF PROCESS IN ACTION.** Where a foreign corporation is permitted to transact its business in a state, upon the condition that it may be sued within such state, upon its contracts entered into therein, it will be liable to service of legal process, involving such contracts, by or through its agents, or upon some person designated for that purpose; *Ex parte Schollenberger et al.*, 6-59.

66. —. Any service which would be sufficient as against a domestic corporation may be authorized to commence an action against a foreign corporation; *Pope et al. v. T. H. Car & Manuf. Co.*, 9-602.

67. —. Under the New York code the delivery of summons, within the state, to the president, secretary or treasurer of a foreign corporation does not require that the officer served should be in the state in his official capacity, or engaged in the business of the corporation, or that the corporation shall have any property within the state, or that the cause of action should have arisen in the state. *Id.*

68. **NOTICE OF SUIT.** The requirement of the statute, that notice of suit must be sent to the home office of a foreign corporation, against which suit is brought, is not jurisdictional, and in a proceeding in personam is extra-territorial, if not nugatory; *Emerson Talcott Co. v. McCormick Co.*, 10-614.

69. **POWER OF STATE OVER.** An answer to a suit, by an insurance company, on a promissory note executed to such company in consideration of a policy of insurance issued by it, alleging that the plaintiff is a foreign insurance company; that the contract of insurance was made in the state where suit is brought, and that prior to the execution of the policy the company and agent had failed to comply with a statute regulating foreign insurance companies and their agents, is bad on demurrer; it must go a step further and show a non compliance with the statute; *Black v. Enterprise Ins. Co.*, 3-294.

70. **POWER OF STATE.** The constitutional power of the congress of the United States to regulate commerce does not exclude the exercise of concurrent power by the states, except so far as congress has actually exercised its power. No act of congress is to be interpreted, in the absence of express words, to invade the police power of the state, and the regulation of the doing of business by a foreign corporation is such a police law of the state; *Amer. Un. Tel. Co. v. W. U. Tel. Co.*, 6-186.

71. JURISDICTION OF STATE. A provision of a state constitution, providing that "no foreign corporation shall do any business in this state without having, at least, one known place of business and an authorized agent, or agents, therein," is not repugnant to the commercial clause of the federal constitution; it is but the legitimate exercise of the police power of the state. *Id.*

72. JURISDICTION OF. Where, by local statute, a corporation is privileged to transact its business in a state other than that of its creation, upon condition that it shall stipulate to be found therein, for the service of such legal process as may issue against it from any court of the commonwealth, having jurisdiction of the subject matter, the federal court having jurisdiction of the subject matter, being within the state, will take jurisdiction of the corporation; *Ex parte Schollenberger et al.*, 6-59.

73. STATUTE FORBIDDING FOREIGN CORPORATIONS TO SUE IN FEDERAL COURTS. A statute of a state prohibiting foreign corporations from suing in the federal courts, can have no force in cases already pending in such courts at the time the statute takes effect; nor can such a statute make null a decree of that court by denouncing a penalty against the suitor; *Elston v. Piggott*, 10-313.

74. QUERE. Whether a state can compel a foreign corporation to refrain from suing in the United States courts. *Id.*

75. —. A title to land acquired by a foreign corporation under a sale made December 24, 1879, on a decree rendered in its favor by the circuit court of the United States on the 2d day of July, 1879, in a suit commenced February, 1879, on a mortgage executed long prior to 1879, is not rendered void by the fact that in June, 1879, the corporation sued in that court on a mortgage executed by a person having no connection whatever with the person who executed the mortgage sued on in the first suit. *Id.*

76. LEGISLATIVE POWER; PENALTY. It is within the power of the legislative department of a state government to enact a statute (see Insurance Law of Illinois; Cothran's Annotated Statutes, 823, § 22) prescribing a penalty to be imposed upon any agent of a foreign corporation — in this case an insurance company — for acting for such company without a certificate of authority, from the auditor of the state, showing it has complied with the requisitions of the statute. So it is within the power to declare, by statute, that any person aiding, in any manner, in transacting the business of any such company shall be subject to such penalty; *Pierce v. People*, 9-213.

77. CONTRACTS OF. It is competent for the legislature to declare all contracts made by a citizen of the state with a foreign corporation — in this case an insurance company — having no right to do business within the state, void. This on the ground such contract is contrary to the public policy of the state. In furtherance of this same object the legislature may declare it a penal offense on the part of any person within the state, whether acting on be-

half of the corporation or with it—as an insurer or one insured—to do any thing, within the state, by way of executing contracts with such foreign corporation, not qualified to do business within the state under the local law. *Id.*

78. FAILURE OF AGENT TO FILE POWER OF ATTORNEY. The failure of the agent of a foreign corporation to file the power of attorney required by statute, will not invalidate a decree rendered in favor of the corporation. Such failure is matter to be pleaded in abatement in the suit; *Elston v. Piggott*, 10-313.

79. LICENSE. Notwithstanding the license of a foreign corporation to do insurance business was subsequently revoked, yet it not having been revoked at the time defendant effected his insurance and gave his note, such subsequent revocation would not change his liability on the note; *Lycoming Fire Ins. Co. v. Langley*, 10-542.

80. ENFORCING DECREE IN FAVOR OF. Plaintiff having obtained a valid decree, has a right to enforce it in the usual manner. The enforcement can not be prevented by showing a failure to file a power of attorney by the agent; *Elston v. Piggott*, 10-313.

81. CERTIFICATE OF CAPACITY TO ACT. In the state of Indiana (Rev. Stat., 1881, § 3765) a foreign insurance company is not required to file in the office of the clerk of the circuit court, a certificate, of the auditor of state, showing that it is authorized to do business in the county; but, it is made the duty of any agent, of any such company, who assumes to act as such agent in the transaction of insurance business in any county, to procure and file in the office of the clerk of the circuit court of the county, a certificate from the auditor of the state, showing that he is authorized to act as such agent in the transaction of insurance business, for such company, in such county; *State v. Tumey*, 9-234.

82. EMBEZZLEMENT BY AGENT. An agent of a foreign insurance company, being prosecuted for the embezzlement of moneys of the corporation received by him in the course of his agency, can not defend against the charge by proof, that he, as agent, has not complied with the requirements of a statute requiring that the person who assumes to act as the agent of such a company in the transaction of insurance business, in any county, shall procure and file, in the office of the circuit court of the county, a certificate, from the auditor of state, showing that he, as such agent, is entitled to carry on the business of insurance for such company, in such county, and had, therefore, received such moneys, for the company, upon an illegal consideration and in the transaction of an unlawful business. *Id.*

83. ATTACHMENT AGAINST. If a foreign corporation shall have made a general assignment for the benefit of its creditors, in good faith, it being insolvent, a court of equity will enjoin the prosecution of a suit commenced by attachment after assignment executed, the writ being levied on property assigned and in possession

of the assignee, under its jurisdiction to prevent the be-clouding of title ; *Thorington v. Gould*, 6-147.

84. PLEADING ; JURISDICTION. In a suit against a foreign corporation, where it is not alleged or anywhere shown, that defendant had its chief place of business in the state, the petition will be dismissed for want of jurisdiction ; the proceeding must be by attachment ; *Middough v. St. Joseph & Denver City R.R. Co.*, 8-91.

85. —. ADAMS, j., dissenting, held, that under a proper construction of the statute of Missouri, writs may be served on foreign corporations in the same manner as on domestic companies. The statute is broad enough to cover both cases. *Id.*

86. —. Also, where a foreign corporation puts in an answer to a petition, filed against it, such appearance waives any defect which there may have been in the service of summons. *Id.*

87. PLEADING. In an action by a foreign corporation to enforce a statutory right — in this case the custody of a child was claimed — the complainant must set forth, according to its tenor, so much of the foreign statute as is relied upon. Defects of the complaint, in this respect, can not be cured by recitals of the reply ; *Milligan v. State, ex rel. Children's Home etc.*, 9-262.

88. POWER OF ATTORNEY. It being shown that a corporation is a foreign corporation and that its attorney acting in the execution of a deed is a foreign attorney, and that the papers of the corporation are out of the power of the plaintiff and beyond the reach of the process of the court, secondary evidence of the existence of a power of attorney and its contents are admissible, without regard to the provisions of the recording act ; *Evans v. Lee*, 8-338.

89. SEQUESTRATION : PLEADING. When a bill is filed in the circuit court of the United States for one state, against a corporation created by the laws of another state, by a judgment creditor, praying a sequestration of its property, rights and franchises, and for the appointment of a receiver thereof, with power to collect from its stockholders the amount of the unpaid subscriptions, or sufficient thereof to satisfy such judgment, and for payment of his judgment, it is sufficient to allege the amount and value of such unpaid subscriptions, and to show that such subscriptions are more than sufficient to satisfy such judgment ; *Winans v. M'Kean R.R. and Nav. Co.*, 1-103.

90. JURISDICTION. That such corporation has no property in the district in which the bill is filed, and no property anywhere but such unpaid subscriptions, is no objection to the jurisdiction of the court, and no defense to the suit. *Id.*

91. STATUTE OF LIMITATIONS. The code of Nebraska bars actions upon contract in five years, not computing the space of defendant's absence from the state. In the case of a foreign corporation, if it has a managing agent in the state, service of

process may be made upon such agent. Held, that the statute began to run from the date of the presence of such managing agent in the state; that is, there must be the opportunity during five years before suit brought, for plaintiff to have sued defendant in the state and compelled it to answer, by service upon a managing agent; *Express Co. v. Ware*, 5-72.

92. STATUTE OF LIMITATIONS OF NEW YORK. The courts of New York have decided that a foreign corporation can not avail itself of the statute of limitations of that state. This, notwithstanding the defendant was the lessee of a railroad in and had property within the state, as well as a managing agent residing and keeping an office within the state; *Tioga R.R. Co. v. Blossburg & Corning R.R.*, 4-265.

93. INJUNCTION. A court of equity will not reach out by injunction, at the suit of a foreign corporation which has not complied with state law and has no property interest in the state, to enjoin another corporation from obstructing it in proceedings tending toward its doing business; *Amer. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

94. —. Injunction will issue to restrain the use and occupancy of land, by a foreign corporation which is using, by sufferance, the right of way of a domestic corporation, until just compensation has been made by the party using or his principals; *Holbert v. St. Louis etc. R.R. Co.*, 6-531.

See CITIZENSHIP; CONSOLIDATION; DISSOLUTION; FORFEITURE; INSURANCE COMPANIES; TAXATION.

FORFEITURE OF FRANCHISE.

1. EXTENT OF. Any one, or more, of the distinct annexed franchises of a corporation may be forfeited without disturbance of the right to exercise others, or affecting corporate life; *G. Rapids Bri. Co. v. Prange*, 6-596.

2. FACTS MUST BE JUDICIALLY ASCERTAINED. A court is without authority to order the liquidation of a corporation and the transfer of its assets to commissioners until the propriety of such an order has, on proper inquiry, been judicially ascertained; *State of Louisiana v. Citizens Sav. Bank*, 7-250.

3. TO BE JUDICIALLY FOUND. Infraction of a public statute is ground for forfeiture of chartered rights and cause of invalidity of contracts affected by the illegal transaction, but the misuser of the franchise will not warrant a decree of dissolution until the default has been judicially ascertained; *Importing & Exporting Co. v. Locke et al.*, 5-135.

4. NECESSITY OF JUDICIAL FINDING. An answer to the complaint of a corporation that it had forfeited its charter, by non-user, not averring that a forfeiture, claimed in defense of an action, had been declared by judicial proceedings for that purpose, is demurrable; *West et al. v. Carolina Life Ins. Co.*, 6-190.

5. **MUST BE JUDICIALLY DECLARED.** Where a corporation forfeits its charter, by non user or by mis-user, no advantage can be taken of such act of forfeiture save on process in behalf of the state, instituted directly, for the purpose of avoiding the charter. Individuals can not avail themselves of it, in suits, until the forfeiture is judicially declared; *Blackwell v. State of Arkansas*, 6-210; *Att'y Gen. v. Chi. & Evanston R.R. Co.*, 10-246; *In re La. Sav. Bk.*, 10-466.

6. **STATUTE NEEDED.** There can be no power to impose forfeitures unless granted by clear legislative enactment. Such power is not consistent with common law, or ancient right, and it can not be obtained from any thing but the sovereignty; *People, ex rel., v. Fire Department*, 5-470.

7. **CARE EXERCISED.** Courts proceed with great caution in proceedings which have for their object the forfeiture of corporate franchises. It is not every non performance of the condition in the act of incorporation, or every mis-user, that will forfeit the grant. A substantial performance, according to the intent of the charter, is all that is required; *Chicago City Ry. Co. v. People, ex rel. Story*, 5-310.

8. **FOREIGN COMPANY.** The courts of one state have no jurisdiction to decree a forfeiture of the franchises of a corporation organized under and existing by virtue of the laws of another state; *Importing & Exporting Co. v. Locke et al.*, 5-135.

9. **ORDER IN CHAMBERS.** An order of court rendered in chambers and out of term can not operate to forfeit the charter of a corporation; when the issue of forfeiture vel non, was put in question by answer; *State, ex rel. Morey, v. The Judge etc.*, 7-247.

10. **TRIAL BY JURY.** The constitutional provision, giving trial by jury, was not intended to confer the right in any class of cases where it had not theretofore existed; nor was it intended to introduce it into special summary jurisdictions, unknown to the common law, and which do not provide for that mode of trial; *Ward, rec'r, v. Farwell*, 6-490.

10½. **NON-USER OR MIS-USER.** A charter may be forfeited for non user or mis-user, but its dissolution for either of these causes can be effected only by the judgment of a court of competent jurisdiction. Such matters can not be set up collaterally; *City of Atlanta v. Gate City Gas Light Co.*, 10-150.

11. **GROUND OF — MIS-USER.** Franchises may be forfeited by breach of the trust on which they are granted and perversion of the end of the grant or institution. The performance of the duties enjoined by the charter is a condition of the grant; *People etc. v. President etc.*, 4-555.

12. —. By the common law, a mis-user, by a corporation, of its franchise, is a cause of forfeiture. If there be such an abuse of the franchises as affords good cause of forfeiture, independent of the statute, a statute enacting such forfeiture is not an ex post

facto law; it is but declaratory of the common law, and affords a new and appropriate remedy for reclaiming, by the state, the rights and privileges conferred by the charter; *Ward, rec'r, v. Farwell et al.*, 6-490.

13. CAUSE OF. Where there has been a mis-user or non user in regard to matters which are of the essence of the contract between the corporation and the state — as expressed in the act of incorporation — and the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture; *State of Nebraska, ex rel., v. Council Bluffs & Neb. Ferry Co. et al.*, 8-336.

13½. NON USER. Though a corporation shall have ceased to do business for a number of years — in this case eight — and its officers and stockholders are, with two exceptions as to the latter, non residents of the state and there is no agent within the state, still, equity can not divest it of its title to its franchise and real estate by decreeing a sale thereof and distribution among the stockholders. Certainly it could have no such jurisdiction in the absence of some enabling statute and of the presence in court of all the stockholders as parties to the bill; *Craft, exec'r, v. Lumpkin Chestalee Mining Co.*, 7-13.

14. MIS-USER OF FRANCHISE BY AGENT. Where a corporation gives instructions, in carrying out the purpose and business of its creation, which are in accordance with, and within, the charter prescribing its business, violations of such instructions by mere agents, which violations are unknown to the managing officers of the corporation, are not ground of forfeiture of this charter; *Tuscaloosa Scientific and Art Ass'n v. State, ex rel.*, 6-120.

15. BAD FAITH AN ESSENTIAL TO ENFORCEMENT. Where a corporation clothed with large and extensive powers to purchase existing railroad companies supposed it had made purchase of one such company, but acquired no title, the deed being invalid by reason of a defect of power in the corporate vendor, and has entered into possession and carried on the business of the road claiming to be the owner under the deed and had exacted and received illegal and excessive charges for transportation, which formed the basis of complaint, in the absence of any charge of fraud or bad faith, the exaction and receipt of such excessive rates could not be construed as a violation of its charter furnishing cause sufficient to work a forfeiture thereof; *State of Maryland v. Consolidated Coal Co.*, 7-364.

16. REQUISITE OF STATUTE. A statute which imposes a forfeiture of franchises for failure to perform, should explicitly fix the time at which such forfeiture may be enforced; *Toledo & Ann Arbor R.R. Co. v. Johnson*, 9-477.

17. HOW WORKED. A claim of the forfeiture of a franchise can not be raised collaterally; but, only in a direct proceeding, instituted for the purpose. *Id.*

18. **STRANGERS MOVING FOR.** The violation of the by-laws and constitution of a corporation, by its officers and members, affords no right of action or lawful cause of complaint, to persons who are not members of, but are strangers to such corporation; *Tomlinson v. Bricklayers Union*, 9-269.

19. **WHO MAY SEEK.** A cause of forfeiture of a franchise can not be taken advantage of collaterally, or otherwise than by a direct proceeding for that purpose; and this can be brought only by the government which granted the franchise; *State v. Woodward*, 9-285.

19½. —. A cause of forfeiture, such as non user of the franchise, that has been judicially declared, can not be taken advantage of collaterally—as in a proceeding to collect benefits; *Barren Creek Co. v. Beck*, 10-333.

20. **STATE ALONE CAN WORK.** It is well settled that a cause of forfeiture can not be taken advantage of, or enforced collaterally or incidentally, or in any other mode than by a direct proceeding instituted for that purpose against the corporation. The state, creating a corporation, can alone institute such a proceeding; *Musgrave v. Morrison et al., rec'rs etc.*, 7-411.

21. —. A corporation having once become a legal entity, its franchise can be avoided, annulled, revoked or forfeited only by the legislature, if it has reserved the power so to act, or at the suit of the commonwealth, or of the attorney general representing the state and not upon the application of private individuals; *Rice et al. v. Nat. Bank of the Commonwealth et al.*, 7-483.

22. **PROCEEDINGS FOR, BY CREDITOR.** A statute provided for forfeiture of charter and liquidation of corporate affairs, upon evidence of its insolvency by execution returned nulla bona. A creditor of a corporation suing for such forfeiture, before he can demand the provisional appointment of a receiver, or judicial sequestrator, must prove that the corporation is of the special class made subject to forced liquidation under the law; *Bothick v. Soc. Termine Dereche*, 7-233.

23. **WHO MAY PROCEED FOR.** Proceedings by scire facias, or otherwise, against a corporation for the forfeiture of its charter, can not, in Maryland, be maintained, except by the sanction and authority of the legislative department of government; nevertheless, a special act of the legislature is not required for this purpose. It is competent for the legislature, instead of passing a special act authorizing such proceedings to be instituted in a particular case, to authorize such proceedings to be instituted by private parties, or to confer the power on the governor to cause a proceeding to be instituted in his discretion whenever he may consider the public interests to require it; *State of Maryland v. Consolidation Coal Co.*, 7-364.

24. **BANK.** Before a suit for the forfeiture of the charter of any bank, located in the city of New Orleans, can be entertained,

it is indispensable that a petition praying for the forfeiture shall be presented by the attorney general, or by the district attorney, or by them both; *State of Louisiana v. Citizens Savings Bank*, 7-250.

25. **MANDAMUS TO STATE AUTHORITY.** The state, which grants a charter, alone may institute a proceeding for its forfeiture, since it may waive a broken condition of the contract made by it. The attorney general represents the state in court. It follows that in the silence of the legislature restraining suit for forfeiture of charter or directing proceedings to obtain a forfeiture, a discretion is vested in him. Such discretionary power can not be controlled by mandamus. No individual, or aggregation of individuals, can interfere with the state in the exercise of its sovereign power, nor compel it to proceed for a forfeiture of charter, which the state, in the exercise of its sovereignty, may not choose to demand; *State, ex rel. v. Attorney General*, 7-221.

26. **FINDING TO WARRANT.** To form a sufficient foundation for a judgment of ouster against a corporation for the forfeiture of a franchise legally vested and not originally usurped, because of the breach of a condition subsequent, the verdict must show the fact not merely of the breach of the letter of the subsequent condition, but of its intent and meaning and must find such facts as the court may adjudge to amount to a substantial breach of the condition; *People etc. v. President etc.*, 4-555.

27. **NON PERFORMANCE OF CONDITION WHICH WILL WORK IT.** A license to prosecute a work, as to construct and maintain a railway upon a city street, provided such railway be constructed with a certain period of time stated therein, is a license upon a condition, the non performance of which would work a forfeiture of such license; *Chicago City Ry. Co. v. People, ex rel.*, 5-310.

28. **CONDITIONS SUBSEQUENT.** A failure literally to comply with conditions subsequent is not necessarily a cause of forfeiture; a substantial performance is all that is required; *People etc. v. President etc.*, 4-555.

29. —. After the lapse of fifty years from the incorporation of a turnpike company and the construction of its road, an action was brought to vacate its charter, on the ground of mis-user, in omitting to comply with the provisions of its charter in the original construction of the road, and also in failing to keep the road in repair. It was held, that the fact must be established not only of a deviation from the statute, in the construction of the road, but that the road was thereby rendered injurious or inconvenient to the public; that the company was not bound to continue the road in the same condition required in its original construction, but only in a good state of general repair; and, that to warrant a forfeiture, for an omission to keep in repair, it must be alleged and found, that the want of repair was such as to render the road dangerous or inconvenient to travelers. *Id.*

29½. **FAILURE OF ATTEMPTED CONSOLIDATION.** Where two, or more, turnpike companies attempted a consolidation, which consolidation is declared illegal, by the supreme court, there is no ground for the forfeiture of the franchise of one of the companies, by reason of the non user of its separate corporate rights during the period of such attempted consolidation; *State, ex rel. etc., v. Crawfordsville etc. Turnpike Co.*, 10-343.

30. **AMENDMENT BY GENERAL STATUTE.** A statute which provides that if any railroad corporation shall demand or receive higher or greater than specified rates, it shall be deemed to have misused its powers and violated the terms on which its charter and franchises were granted, and proceedings may be instituted against it for a forfeiture of its franchises, or the collection of a fine not exceeding \$1,000 for each such violation, at the discretion of the court, is not a law impairing the obligation of a contract. Whether because it declares that to be a forfeiture which was not such before its passage or because it prescribes a money penalty; *State of Minnesota v. Winona & St. Peter R.R. Co.*, 4-496.

31. **HOW ENFORCED.** A cause of forfeiture of a franchise can be enforced against a corporation in no other mode than by a direct proceeding against the corporation for that purpose. It can not be taken advantage of or enforced collaterally, or incidentally; *Blackwell v. State*, 6-210; *Atty. Gen. v. Chicago & Evanston R.R. Co.*, 10-246; *In re La. Sav. Bk.*, 10-466.

32. **WAIVER OF FORFEITURE.** A railroad company was incorporated in 1835, by the legislature, and a specified time granted it in which to complete its line of road, etc. Extensions of time in which to complete the road were granted, from time to time, the last expiring January 1, 1848. From that date to February 25, 1848, there was no grant of time and the company not having constructed its road, was in default, the state having a complete right to enforce a forfeiture of its charter. On the day last named the legislature provided that the company might "have six years further time to complete the said road, in the event the same is not sold or transferred," to another corporation, "as herein provided." February 25, 1852, the legislature further made provision "that the creditors of" the road "shall have the right to satisfy their debts out of any of the property of said company," notwithstanding and in preference to any lien of the state. Held, these acts recognize the existence of the corporation on the part of the state at the date of the last and that by the first, extending the time to complete the road, the state waived its right to enforce the forfeiture. If the road was sold, under the act, then the waiver is withdrawn and the right of the state to enforce the forfeiture revived. The forfeiture not having been enforced the company remained a legal entity competent to sue and be sued; *LaGrange & Memphis R.R. Co. v. Rainey et al.*, 4-175.

33. **WAIVER OF FORFEITURE.** A license, by a municipal corporation (as to construct and maintain a railway upon a street named within a specified length of time) is such a license as the local legislature has the right and power to waive the condition of, as to the time of performance, it being a provision in favor of the municipality to secure the public interests; *Chicago City Ry. Co. v. People*, ex rel., **5-310**.

34. —. Although a corporation has engaged in another and different business than that provided in its charter, so that a forfeiture of its franchise may have been declared, yet, if the legislature during the existence of such ground of forfeiture has passed a law amending the act under which it was organized, in which its corporate existence is recognized, its acquisition of real estate is recognized, its powers enlarged and new ones conferred, such amendatory act will be construed as granting a new charter, and a waiver of any ground of forfeiture; *People v. Ottawa Hydraulic Co.*, **10-279**.

35. **WHO MAY WAIVE.** A limitation imposed upon the exercise of a grant made by the state, and the forfeiture arising from the non performance of the condition, can be waived only by the sovereignty; but, where a city makes a grant, in the nature of a license, to be availed of within a fixed period, the city may, for satisfactory reasons, waive a strict performance; *Chic. City Ry. Co. v. People*, **5-310**.

36. —. The commonwealth may waive a strict compliance with the terms of the act of incorporation, and may elect whether it will insist upon a forfeiture if there has been a breach of condition; *Briggs v. Cape Cod Ship Canal Co.*, **10-568**.

37. **WHEN NOT SUBJECT TO REVIEW.** It is manifestly improper on the part of an inferior tribunal, sitting for the assessment of damages caused by the expropriation of property, under laws of eminent domain, to pass upon questions of corporate existence and the right to exercise corporate franchises; *Schroeder, relator, v. Detroit, Grand Haven & Milwaukee Ry. Co.*, **6-653**.

38. **EXISTENCE MAY BE DISPUTED.** The existence of a corporation is independent of annexed franchises and is not affected by their surrender, forfeiture or expiration by lapse of time. Wherefore, although an individual may not, in a collateral proceeding, dispute such corporate existence, nor, in a private action, take advantage of the forfeiture of that franchise, he may question distinct and subordinate annexed franchises; *Grand Rapids Bridge Co. v. Prange*, **6-596**.

39. **WAIVER OF PROCESS.** The officers of a corporation are without authority to waive the service of a petition praying a forfeiture of its charter, or to waive the delay within which third persons may intervene to protect their interests, or of filing an answer which virtually confesses the forfeiture of the charter and admits the necessity of the immediate liquidation of the company; *State of Louisiana v. Citizens Sav. Bk.*, **7-250**.

40. **LIQUIDATION UNDER.** Where a petition is filed praying, for certain causes alleged, the forfeiture of the charter of a banking corporation, an order of court which does not decree the forfeiture, but, which merely appoints commissioner to take charge of the assets of the company, can not be construed as directing the liquidation of the affairs of the corporation; *State, ex rel. Morey, v. Judge etc.*, 7-247.

See **DISSOLUTION**; **QUO WARRANTO**; **TURNPIKE COMPANY.**

FORFEITURE OF STOCK.

1. **WHAT IS NOT.** A statement in the calls, which remain unpaid, that the stock will be forfeited if not paid, is not equivalent to a forfeiture thereof. While it would be wrong to collect assessments on forfeited stock, it is necessary in defending a suit for such assessments to aver and show a forfeiture, for if the stock is still recognized as the property of the subscriber he should pay for it; *Macon & Augusta Ry. Co. v. Vason et al.*, 7-4.

2. —. Repeated declarations, by resolution of the corporation, that the stock of delinquent subscribers will be forfeited, unless payment be made at a time fixed, do not amount to a forfeiture of shares. To work a forfeiture there must be an actual declaration thereof; *Water V. Manuf. Co. v. Seaman*, 8-32.

3. **REMEDY AGAINST DELINQUENT.** The remedy against a delinquent subscriber for stock is to enforce payment, by a judgment for the money. It is not by forfeiture or sale of his stock; *Gill's adm'r v. Kentucky etc. Mining Co.*, 3-346.

4. —. The act of becoming a stockholder in a corporation, by subscribing articles of association, is one from which the law raises a promise to pay the instalments legally assessed and demandable. The common law furnishes a remedy for a violation of this engagement by an action of assumpsit. The subsequent enactment authorizing forfeiture and sale of the stock is cumulative as a remedy; *Hughes v. Antietam Manuf. Co.*, 3-377.

5. —. A subscriber for shares in the capital stock of a corporation refused to pay the assessments on the shares. The company did not formally declare such shares forfeited, but procured subscriptions from other persons to the full amount of the capital stock as fixed by the directors. It was held that the company could not thus sell the shares and sue the subscriber for the difference between the assessment and the sum for which the shares were sold, under a statute which provides: (1) the shares may be sold, and any deficiency collected by an action; (2) the shares may be declared forfeited, and may be transferred to any responsible person who will subscribe for the same; *Athol & Enfield R.R. Co. v. Inhabitants of Prescott*, 4-448.

6. **FORFEITURE**; **CUMULATIVE REMEDY.** A corporation may maintain an action upon an express promise to pay assessments on stock, although, by a subsequent provision of the subscription

paper, it is authorized, in case of non payment, to sell the stock ; Boston, Barre & Gardner R.R. Co. *v.* Wellington, **5-442**.

FORGERY.

1. **TRANSFER OF STOCK.** A corporation may maintain an action against one who presents a forged power of attorney to transfer stock, on the faith of which the corporation issues to such person a new certificate of stock, although such person acted in good faith ; Bost. & Alb. R.R. Co. *v.* Richardson et al., **9-472**.

2. **FORGED INSTRUMENT.** A mistake in recognizing a forged instrument, in writing, is binding, only, when the forgery is such that it ought to have been detected by a bare inspection of the instrument itself, without reference to books, or any thing outside of the document presented, even the memory of the party, as to the written obligations which he has issued ; Nat'l Bank of Comm. *v.* Nat'l Mech. Banking Assoc., **4-605**.

3. **LIABILITY ; RAISED CHECK.** A bank is not bound to know the handwriting or genuineness of the filling up of a check. It is legally concluded only as to the signature of the drawer, and its own certification. *Id.*

4. —. Where a bank has, by mistake, paid to a bona fide holder the amount of a certified check, which, after certification, had been fraudulently altered by raising the amount, it was held that it could recover, the sum paid, back, unless the holder had suffered loss, as a consequence of the mistake. *Id.*

See **CRIMINAL LAW ; EQUITY ; PLEADING ; TRANSFER OF STOCK** (73-86).

FORMER ADJUDICATION.

1. **JUDGMENT ON BONDS.** A judgment was recovered upon bonds executed by a municipal corporation. In a subsequent action upon other bonds of the same series, between the same parties, it was held that the judgment was conclusive ; City of Beloit *v.* Morgan, **2-11**.

FRANCHISE.

1. **ITS NATURE.** The term "franchise" has several significations and there is some confusion in its use. The better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant. It does not embrace the property acquired by the exercise of the franchise ; City of Bridgeport *v.* N. Y. & N. H. R.R. Co., **3-189**.

2. —. The term "franchise," must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad company are rights or privileges, which are essential to the operations of the corporation and without which its roads and works would be of little value : such as the franchise to run cars, to charge tolls, to appropriate earth and gravel for the bed of its road, or water for its engines,

and the like. They are positive rights, or privileges, without the possession of which the road or the company could not be successfully worked; *Morgan v. State of Louisiana*, 6-12.

3. **HOW GRANTED.** Corporate franchises, in the American states, emanate from the government, or the sovereign power, owe their existence to a grant, or, at common law, to prescription (which pre-supposes a grant) and are vested in individuals or a body politic; *Chic. City Ry. Co. v. People, ex rel.*, 5-310.

4. **HOW ACQUIRED.** The right to be a corporation is a franchise; and, to acquire a franchise, under a general law, the required statutory conditions must be complied with; *People, ex rel., v. Seabridge et al.*, 6-242.

5. **SPECIAL PRIVILEGES.** A constitutional provision inhibiting the granting of any special franchises, save by general legislation, is violated by a legislative enactment which seeks to empower a board of supervisors of a county to grant to a turnpike road corporation, powers in respect to the assessment and collection of tolls etc., which are not common to all similar corporations organized under the general law, or which, through the same agency, imposes on such corporate body, or on but a portion or particular class of such corporations obligations not common to all such corporations; *Waterloo Turnpike R. Co. v. Cole*, 6-235.

6. **ADDITIONAL FRANCHISE.** It is competent for the legislative department of the state to confer upon any existing corporation and all other similar corporations, by general law, additional powers and the law of original organization of such companies will become fixed as to the subject of their powers at that date. It is as competent for the legislature to confer additional powers, privileges and immunities by the subsequent as by an original act; *People v. Perrin*, 6-267.

7. **POLICE POWER.** So far as corporate franchises are publici juris it has always been held that the state may properly legislate touching them. Such legislation is not prohibited by that clause of the federal constitution which forbids the passage of laws impairing the obligations of contracts; *Town of L. View v. Rose Hill Cem. Co.*, 5-252.

8. **DISTINGUISHED FROM LICENSE.** A municipal body possesses no power to confer a franchise, wherefore, a grant by a city, by ordinance, to occupy and use a street, as for a railway, is not a franchise, but a mere license; *Chi. City Ry. Co. v. People, ex rel.*, 5-310.

9. **GRANT BY ORDINANCE.** A right of way being granted by municipal ordinance, consists in nothing more than a right of way. The franchise proper is the right to become, exist and operate as a corporation. The right of way is an incident growing out of such existence, and which determines with the existence of corporate life. Hence, neither the franchise or corporate rights, nor

a right of way so granted, pass at a bankruptcy sale; *N. Orl. Spanish Fort & Lake R.R. Co. v. Delamore*, **9**—374.

10. IMPLIED CONTRACT UNDER. There is, in every case, an implied contract, between the corporation and its stockholders, as well as between the company and the state, that its corporate franchises, powers and property shall not be appropriated to uses or purposes not contemplated or authorized; *Black et al. v. Del. & Rari. Can. Co. et al.*, **5**—547.

11. MAY BE DISPUTED. The existence of a corporation is independent of annexed franchises and is not affected by their surrender, forfeiture or expiration by lapse of time. Wherefore, although an individual may not, in a collateral proceeding, dispute such corporate existence, nor in a private action, take advantage, of the forfeiture of that franchise, yet he may question distinct and subordinate annexed franchises; *Grand Rapids Bridge Co. v. Prange*, **6**—596.

12. OWNERSHIP. The stockholders are the owners of the franchise, property and assets of the company, which remain after its debts and liabilities are discharged, notwithstanding the charter of the corporation may authorize the selection of directors and empower them to transact its business and exercise its franchises; *Chetlain, adm'r, v. Republic Life Ins. Co. et al.*, **6**—397.

13. ASSIGNMENT OF. A franchise has no assignable or marketable value; *City of Bridgeport v. N. Y. & N. H. R.R. Co.*, **3**—189.

14. UNAUTHORIZED LEASE. If, without authority, one company leases its works, as a railroad, to another the latter will only be regarded as the servant of the lessor company and the lessor will not be discharged from its contracts or released from any of its liabilities. Wherefore, such a lease would constitute no defense to an action to recover upon subscription to stock; *Ottawa etc. R.R. Co. v. Black*, **6**—359.

15. TRANSFER OF. The law is well settled that the franchises and corporation and the means vested in it, which are necessary to the existence and maintenance of the object for which it is created, are incapable of being granted away and transferred by any act of the company, or by any adverse proceedings. In the absence of any provision to that effect, either by general law or charter, the franchise can not be levied upon for debt; *N. Orl. etc. R.R. Co. v. Delamore*, **6**—374.

16. DISPOSING OF. It is well settled that a corporation can not lease, or dispose of, any franchise, needful in the performance of its obligations to the state, without the consent of the state. *Black et al. v. Del. etc. Co.*, **5**—547.

17. —. A domestic corporation can not convey its franchises to a foreign corporation, so as to enable the latter to accept and exercise such franchises within the territorial limits of the sovereignty which granted them, without the assent of such sovereignty. *Id.*

18. **SALE OF.** A corporation is not authorized to make sale of its franchise and property, granted or acquired under charter, unless by consent of the legislature, and such consent is not given by an act which authorizes another corporation to purchase like corporations; *State of Md. v. Consolidation Coal Co.*, 7-364.

19. —. A railroad corporation can not voluntarily alien its franchises, or its property, so as to disable itself from performing its obligations and duties to the public, without authority of the legislature. No such authority can be inferred. *Id.*

20. **ILLEGAL TRANSFER.** A sale and transfer of the powers of one company to another, without the authority of the legislature, are against public policy and courts will do nothing which would promote the transfer, as it is in utter disregard of the duties and obligations of the company; *Ottawa, etc. R.R. Co. v. Black et al.*, 6-359.

21. **SALE OF.** Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant and are not, in ordinary cases, subject to execution, or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature; *Randolph et al., trustees, v. Larned, rec'r etc., et al.*, 8-408.

22. **JURISDICTION OF EQUITY.** By statute of New Jersey, the chancellor has discretionary power to order a sale of the franchises, as well as of the property, of an insolvent corporation, clear of incumbrances. *Id.*

23. **ASSESSMENT OF.** An assessment, upon a franchise, is legal if grounded on a direct and immediate benefit, in the increase of the value of the property or stock of a corporation; *City of Bridgeport v. N. Y. & N. H. R.R. Co.*, 3-189.

24. **INVOLVED IN PROCESS OF WINDING UP.** Where a bill is filed against an insolvent corporation by certain of its stockholders and creditors, making the other stockholders parties, praying that the affairs of the corporation be wound up and the corporation itself dissolved, and its effects placed in the hands of a receiver, and a decree is granted to the same extent, a franchise is involved in the litigation, and, in Illinois, a writ of error must be sued out, if at all, by the corporation, from the supreme court; the fact that some defendants have perfected an appeal to the appellate court, will not oust the supreme court of jurisdiction of a writ brought by the corporation; *St. Louis & Sandoval Coal & Mining Co. v. Edwards et al.*, 9-169.

25. **SURRENDER OF.** A private corporation may surrender its franchise. When a method of dissolution is prescribed by statute, that method must be followed; *People etc. v. President and Trustees*, 1-161.

26. **FORFEITURE.** Any one, or more, of the distinct annexed franchises of a corporation may be forfeited without disturbance

of the right to exercise others, or affecting the corporate life; *G. Rapids Bri. Co. v. Prange*, 6-596.

27. EXPIRED. A waiver can not renew an estate which has expired by limitation as to duration. Wherefore, if the right of a corporation, to a special and distinct franchise is limited to a period stated and fixed, it expires with that period and the fact that the corporation continues to exercise it without interference from the state, neither continues nor restores it. *Id.*

28. INSTANCE. A toll bridge corporation, organized for thirty years, was authorized, by competent authority, to exact tolls for the period of twenty years. At the expiration of the period named it continued in existence as a corporation and exercised the franchise of collecting toll. Upon suit brought to recover toll from one who had refused to pay, it was held no traveler over the bridge was under obligation to pay after the twenty years expired. *Id.*

See CHARTER; CONSOLIDATION; DISSOLUTION; EMINENT DOMAIN (2, 3); FORFEITURE OF FRANCHISE; RAILROAD CORPORATION; SURRENDER OF CHARTER; TAXATION.

FRAUD.

1. LIABILITY, RULE OF. Strictly speaking, corporations, while acting within the scope of the powers delegated to them, can not be guilty of willful fraud. It is, however, settled that corporations, carrying on trade or business of any kind, are equally, and to the same extent, liable for the frauds and wrongs of their agents, perpetrated in the course of their employment, as individual principles would be under like circumstances; *West. R.R. Co. v. Frankl. Bk.*, 9-411; *West. R.R. Co. v. Stein Bros.*, 9-411; *West. R.R. Co. v. Rous*, 9-411.

2. IN SUBSCRIPTION FOR STOCK. One who signs his name to the subscription list of a proposed company as a subscriber for stock, but does not carry out any amount of subscription, leaving to that extent a blank, seems to enable the promoters of the organization to represent him as a subscriber, when, in fact, he is not. This is a palpable fraud — morally and under the law. If a person shall thus have signed, it will be presumed he authorized the filling of the blank and he is estopped to question the right of the promoters so to do, when sued by creditors to recover the amount of his subscription; *Jewell et al. v. Rock River Paper Co. et al.*, 9-71.

3. IN ORGANIZATION. If a new corporation be organized by persons interested in an old one, for the purpose of getting rid of the liabilities of the latter and fastening them upon the new company, and the new company bids off the property of the elder corporation for the amount of its liabilities and gives notes to the creditors, secured by deed of trust on the property thus acquired, the fraud, if any, can not affect the creditors. The existence of such state of facts will constitute no defense in an action to compel the

subscribers to stock in the new company to pay the unpaid balances of their subscriptions, to satisfy the liabilities the new company assumed. *Id.*

4. FRAUD OF DIRECTORS. Action, against certain directors, to recover for a fraudulent breach of trust in dealing with the corporate property. The petition failed to show that the corporation had failed to sue or that it was under the control of defendants. If objection to this had been made in the trial court it would have been good; aliter, when without objection the cause reached the appellate court; *Bulkley v. Big Muddy Iron Co. et al.*, 9-533.

5. THROUGH REGISTRY LAWS. A party will not be permitted to make use of the registry act as an instrument of fraud; *Gill v. Russell*, impleaded etc., 7-611.

See DECEIT; DIRECTORS; EQUITY; FALSE REPRESENTATIONS; LIABILITIES; PERSONAL LIABILITY; PLEADING; SUBSCRIPTION FOR STOCK; TRANSFER OF STOCK.

G.

GARNISHMENT; see ATTACHMENT; RECEIVER.)

GAS LIGHT COMPANY.

1. A gas company, chartered by the legislature, manufacturing and furnishing gas to individuals and for the lighting of public streets, on such terms as are agreed upon, is not necessarily a public corporation. It is not public merely because it is of a public character; *N. Y. Cent. & H. R.R. Co. v. Met. Gas Light Co.*, 5-573.

2. DUTY AS TO LAYING PIPES. It is the duty of a gas light company, when laying pipes in the streets of a city, to perform the work so that other persons may receive no injury through the negligence of the company, or its agents, in their use of such streets; *Dillon v. Washington Gas Light Co.*, 5-193.

GENERAL INCORPORATION LAW.

1. REPEAL. The repeal of a general statute, for the incorporation of companies, by a statute which substantially re-enacts and extends its provisions, does not terminate the existence of corporations organized under it; *United Hebr. Benef. Ass'n v. Ben-shimol*, 7-536.

See CHARTER; CORPORATE EXISTENCE.

GIFT.

1. OF STOCK. It is essential to constitute a valid gift — in this case of stock — that there should be a delivery such as vests in the donee, control, or dominion, over the property and absolutely divests the donor, and the delivery must be made with intent to

vest the title in the donee; Jackson, exec'r, v. Twenty-third Street Ry. Co., 9-623.

2. **INSTANCE.** S. purchased and paid for thirty shares of the defendant's stock, directing the treasurer of the company, at the time, to set it aside in the name of Y., plaintiff's testator, and he—S.—would let him know whether to deliver it to Y. and what to do with it at some future time. The treasurer issued a receipt stating that he had received the purchase price from Y., which receipt came into the possession of the latter—in what way it was not made to appear. Y. had married a niece of S., lived in his family and had adopted a child in whom S. took a special interest. Afterward S. told Y. that he could make the shares but twenty-seven and as the receipt had been made out to him he would want an order for the three shares. Y. thereupon gave an order directing the company to transfer three shares of the stock then held by him, as S. might direct. No certificate of the stock was ever issued. When a dividend had been declared thereon, S. directed Y. to go to the office for it, that he had had the dividends made out in his name and they would support or help support the child, and the dividends were paid to Y. by the direction of S., until the death of Y. After the stock had thus been placed in the name of Y., his wife died; he married again and his second wife ceased to take care of the child. In an action to compel defendant to issue to plaintiff a certificate of the stock, a majority of the court held that there was no valid gift of the stock, as it was clearly not the intention of S. to vest the title in Y. for himself, but to create a trust for the benefit of the child; nor was it his purpose that Y. should control the stock and that this defense was available to defendant. *Id.*

GRAVEL ROAD COMPANY; see **TURNPIKE CORPORATION.**

GUARANTY.

1. **OF MUNICIPAL BONDS.** A railway company having authority to issue its bonds to raise money to carry into effect the purposes for which it was created, may guaranty bonds issued by municipal corporations, and received and put upon the market by such company, as a means of accomplishing the same end; Chicago, R. I. & P. R.R. Co. v. Howard et al., 1-1.

2. **GENERAL RULE.** Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is, that these acts in that respect were done in the regular course of their authorized business. *Id.*

See **POWERS.**

GUARDIAN; see **TRUST AND TRUSTEE.**

H.

HIGHWAYS.

1. COUNTY BOARD OF SUPERVISORS. A county board of supervisors, in Illinois, has the right to inquire into all the facts which give to highway commissioners jurisdiction; and when jurisdiction is wanting, all acts done to enforce jurisdiction are void; *People, ex rel., v. Board of Supervisors*, 2-162.

2. REVIEW OF ORDER OF COMMISSIONERS. The commissioners of highways have no authority to order the construction of a bridge at a place where no highway exists; and if such fact appears, the board of supervisors, to whom the estimate has been reported, may disregard their action. The existence of a public highway is the just predicate. *Id.*

I.

INCIDENTAL POWERS; see POWERS.

INCORPORATION; see ARTICLES OF ASSOCIATION; CHARTER; CORPORATE EXISTENCE; ORGANIZATION; SUBSCRIPTION FOR STOCK.

INCREASE OF CAPITAL STOCK.

1. HOW ALLOWED. An increase of capital stock can be made, only, in conformity with provisions of statute, by the body of the corporators, convened, in meeting, for that purpose; *Finley Shoe & Leather Co. v. Kurtz*, 6-593.

2. —. It is not within the implied powers of any corporate officer to obligate the corporation to an increase of its capital stock. Therefore, no such officer can make a binding agreement with an employe of the company that he shall receive stock of the corporation in payment of money advanced, or for his services. *Id.*

3. ESTOPPEL. The rule which applies to the issue of stock subscribed for applies to any increase of the capital stock. One who subscribes therefor, is estopped to defend against payment of the amount thereof by any defense of irregularity or organization etc.; *Chubb v. Upton*, 6-23.

4. RIGHT OF RESCISSION. An increase of capital stock was voted, by the stockholders of a corporation, from the company's surplus earnings. These earnings were sufficient for a special purpose, which purpose, soon after, became impracticable; the vote was rescinded, no stock was issued and no certificate of increase was recorded, as in such case was required by law. There was no increase of stock; a vote to increase is not, per se, an increase; there was full power to rescind, and if the vote gave any rights acquiescence would waive them; *Terry v. Eagle Lock Co. et al.*, 6-319.

5. **DEFECTIVE CERTIFICATE OF.** Where a meeting of stockholders is held, pursuant to statute for the consideration of the matter of the increase of the capital stock of a corporation and such increase is voted, but the certificate of the vote, required by law to be recorded, is defective in omitting to state the amount of capital stock paid in and the whole amount of the debt and liabilities of the company, such defects will not defeat a recovery of the amount of a subscription by one who has subscribed to the stock, when it appears that his shares were subscribed subsequent to the date of the defective certificate of increase and the facts, in the case, are sufficient to raise the presumption that defendant subscribed with knowledge of the defects and waived the same. A mere subscription in such case, without any payment thereon, or any other act of recognition, will not bind the subscriber; *Kansas City Hotel Co. v. Hunt*, 8-126.

6. **FAILURE TO ACCEPT OPTION TO TAKE.** A statute provided that in case of the increase of the capital stock, of any corporation, the stockholders might take the new stock at par and that the shares not so taken might be sold, at auction, for the benefit of the corporation, "but all premiums realized, from such sales, shall be paid" to those stockholders, in their proper proportions, who did not avail themselves of their right to take the new share. A later statute provided that whenever any corporation subject to the provision of the former statute should increase its capital stock, the shares not taken by the stockholders "may be sold or issued in such manner as the stockholders of the corporation shall, by vote, direct," but that no shares should be sold for less than their par value. While this latter statute was in force a corporation increased its capital stock. The stockholders, by vote, directed that all shares not taken at a certain date should be sold, by public auction or in such manner as to the directors might seem advisable. The directors caused them to be sold by public auction. In an action, by a stockholder to recover the premiums received from the sale of the shares which he did not avail himself of the right to take, it was held the case was governed by the provisions of the latter statute and that the action could not be maintained; *Mason v. Mills*, 9-426.

7. **WHO MAY QUESTION IT.** The question whether the capital stock of a corporation has been properly increased is one the state, only, can properly raise; *Pullman v. Upton*, 6-34.

INDICTMENT.

1. **INJURED PARTY.** When a corporation is referred to in a pleading—in this case an indictment for burglary—by a name such as is usual in creating corporations and which discloses no individuals, a corporate existence is implied, without special averment; *Norton v. State*, 7-109.

2. —. Indictment charging a forgery to have been commit-

ted, by forging the signature of a person on the back of a draft, with intent to defraud such person. It is not necessary to allege that the bank, on which the draft was drawn, was incorporated; *State v. M'Kernan*, 9-540.

3. DEFENSE. An act of the legislature, incorporating a company, may operate as a legislative authority or license, to the parties named in the act and their associates, to do that which the language and the obvious intent of the act authorized them to do, so far, at least, as to constitute a defense to an indictment for carrying on a business prohibited by general statute; *Brent v. State*, 3-111.

See CRIMINAL LAW.

INDIVIDUAL LIABILITY ; see PERSONAL LIABILITY.

INJUNCTION.

1. WHEN NOT GRANTED. A court of equity will not grant a writ of injunction against the officers of a municipal corporation, to restrain acts punishable under the criminal laws, when it is not made to appear that the private rights of the complainant are involved or exposed to injury by such acts; *Jones v. Mayor and aldermen*, 2-56.

2. DISCRETIONARY POWERS. It is by no means true that a court of equity has the power to interfere, by injunction, to prevent a corporation from executing a contract it has a lawful right to make; *Dudley v. Ky. High Sch.*, 5-382.

3. —. Courts of equity will rarely interfere with the exercise of discretionary power by corporate bodies, or their officers, to whom such powers are confided. Wherefore an injunction is not properly issued to prevent the allowance of a fraudulent account; unless irreparable injury therefrom to arise be shown. It would seem that the allowance thereof would bind no one; *Rogers et al. v. Lafay. Agric. Works et al.*, 7-67.

4. ISSUE OF PAPER CURRENCY. A court of equity will not interfere by injunction to restrain the issuance, by a municipal corporation, of bonds to circulate as money, where such issuance is positively prohibited by law, and the bonds when issued must be absolutely void; *Jones v. Mayor etc.*, 2-56.

5. RIGHT SHOULD BE CLEAR. A preliminary injunction should not be granted when the right, on which complainant founds his claim, is, as matter of law, unsettled; *Nat. Docks Ry. Co. et al. v. Cent. R.R. Co.*, 8-420.

6. —. A court of equity will not reach out by injunction, at the suit of a foreign corporation which has not complied with state law and has no property interest in the state, to enjoin another corporation from obstructing it in proceedings tending toward its doing business; *Amer. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

7. TAXATION. Where property assessed is subject to taxation

and the taxes are not illegal an injunction will not be granted to restrain the collection of the taxes, on the ground that the assessment was irregularly made; *Ryan v. Board of Comm'rs of Leavenworth Co. et al.*, 9-359.

8. TO RESTRAIN COLLECTION OF ASSESSMENT. An injunction will not be granted to restrain the collection of an entire assessment against a lot in a city for a street improvement made under a contract with the common council, pursuant to a city ordinance, because, in performing the work, a portion of the lot has been wrongfully appropriated, the fence torn down and a sidewalk made thereon. Such facts do not make a case for the recovery of the real estate. They do, however, constitute a cause of action for trespass. It is no defense thereto that the street improvement has been made under the general provisions of the general law of the state of Indiana, for the incorporation of cities; that no injunction was applied for or obtained prior to the making of the contract, and that the owner has permitted the street to be improved, and has made no objection thereto until after the completion of the work; *City of Ind'polis v. Gilmore et al.*, 2-230.

9. LAND DAMAGES. Injunction will issue to restrain the use and occupancy of land, by a corporation which has not paid damages awarded; *Holbert v. St. Louis, etc. R.R. Co.*, 6-531.

10. —. Where foreign corporation is using, by sufferance, the right of way of a domestic corporation an injunction will issue to restrain such use until just compensation has been made by the party using or his principal. *Id.*

11. UNAUTHORIZED SECURITY. A national bank, formed under federal statute, having no power to take a deed of trust, on real estate, as security for a contemporaneous loan, an injunction will issue to prevent a sale of the property, by the bank, under the deed; *Matthews v. Skinker*, 8-149.

11½. FRAUDULENT TRANSFER OF STOCK. When stock of a corporation is transferred, without consideration, for the purpose of fraudulently controlling an election, a proper remedy is by injunction to prevent the transferees from voting; *Webb et al. v. Ridgely et al.*, 5-421.

12. UNAUTHORIZED. A temporary injunction is unauthorized when it does not appear, from the complaint, that plaintiff is entitled to the final relief which is sought, and the granting of an injunction in such case is error of law, reviewable on appeal; *M'Henry v. Jewett*, 9-640.

13. —. It is not sufficient to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened; there must be some special ground of jurisdiction, and, where an injunction is the final relief sought, the facts entitling the plaintiff to it must be averred in the complaint. *Id.*

14. INSTANCE. A complaint alleged, in substance, that plaintiff was the owner of certain shares of the capital stock of a cor-

poration, which had been pledged to secure a loan and had been transferred on the books of the corporation to defendant, as trustee for the pledgee; that defendant, by reason of his control of the shares, had been enabled to a great extent to control the management of the corporation which issued the shares and had managed the same without regard to its best interests and so as to subserve the interests of another corporation; that defendant had theretofore voted on said shares at elections held by the stockholders and claims the right so to do at future elections; that it is greatly against plaintiff's interest to permit defendant so to vote and that plaintiff will suffer great and irreparable injury if defendant is permitted so to do. An injunction was asked, restraining the defendant from voting on the shares. On appeal from an order granting a temporary injunction, in accordance with the prayer, *pendente lite*, it was held that, in the absence of facts or circumstances supporting the allegations of the complaint, it did not set forth a cause of action and that the granting of the order was error of law. *Id.*

15. SERVICE; NOTICE OF INJUNCTION. A person who has been designated by the corporation, as required by statute, as an agent upon whom process against such corporation may be served, is a proper party upon whom to serve notice of an injunction against such corporation; *Eureka etc. Co. v. Superior Court*, 10-73.

16. NOTICE TO DEFENDANT. Where a statute provides that upon application for an injunction, the defendant shall be heard before granting the temporary injunction, and in the meantime a restraining order may issue, the court should not, where great interests are involved, order a temporary injunction without notice to the defendant, unless in case of extreme emergency; *A. T. & S. F. R.R. Co. v. Fletcher*, 10-432.

17. WHEN BINDING. When an injunction against a corporation is served upon an officer, or its existence is known to an officer, the person so served, or having knowledge, is bound to obey the injunction; *Hatch v. Chi., R. I. & P. R.R. Co. et al.*, 1-79.

18. VIOLATION. On a motion to set aside an injunction, the defendant having alleged that one B. was its managing agent upon whom process should have been served, held, that service of an order for violation of such injunction might be made upon B. Held, further, that it being shown that B. had evaded such service it could properly be made on any one of the attorneys of record of defendant; *Eureka Lake etc. Co. v. Superior Court*, 10-73.

19. TEMPORARY; IRREGULARITY IN. The grant of a temporary injunction on a bill not verified and without bond, as required by statute, is an irregularity. If, however, a perpetual injunction should issue the irregularity will not work a reversal of the decree awarding the latter; *Thorington v. Gould*, 6-147.

20. MANDAMUS TO VACATE. Injunction issued to restrain an action, at law, to recover the amount of dividends declared on stock.

It was made to appear that an attachment had been attempted to be levied on the shares. These shares stood in the name of assignee of the attaching creditor and no statute warranted any such levy. *Mandamus* should issue to cause the injunction to be vacated, motion to dissolve having been overruled; *Van Norman v. Circuit Judge etc.*, 6-663.

See EQUITY; INSOLVENCY.

INSOLVENCY.

1. **LEGISLATIVE POWER.** For the protection of the public, it is a proper exercise of the police power of the state, that the legislature shall prescribe what amount of assets an incorporated company shall possess, or on what basis its solvency shall be estimated; *Chic. Life Ins. Co. v. Auditor etc.*, 9-79.

2. —. A general law provided that on notice, by the auditor of state, an insurance company should cease to issue policies, when he should ascertain an existing deficiency of assets and a disregard of the provision, by any officer or agent of the company, was made punishable by a fine, not exceeding one thousand dollars. It is competent that the legislature shall, on a day subsequent, prescribe another and different remedy. *Id.*

3. —. While it may be a general rule of law that a corporation or person is not insolvent when it, or he, is able to meet all his engagements as they become due, in the ordinary way, it is competent that the legislature of a state shall prescribe a higher standard of solvency, at least as to corporations holding franchises — as insurance companies. *Id.*

4. **EFFECT OF, AS TO AGENCY.** The insolvency of a corporation operates as a revocation of all the powers which had been conferred by it on its agents; *Life Ass'n of America v. Levy etc.*, 7-264.

5. **ASSIGNEE.** The assignee of an insolvent corporation represents its creditors. He is competent to assert their rights to all the property of the insolvent company fraudulently conveyed; *Taylor et al. v. Taylor*, 9-382.

6. **JURISDICTION OF EQUITY.** A bill in equity may be maintained, by an assignee in insolvency of a corporation, against one holding money or other property of the insolvent company, under a contract fraudulent and void as to creditors, when the bill seeks to have the contract annulled and the consideration restored. *Id.*

7. —. Equity will compel the payment of such proportion of stock of the company, subscribed for, which is unpaid, for the purpose of paying the debts of an insolvent corporation. A bill exhibited against the stockholders to that end is a proper remedy; *Dalton etc. R.R. Co. et al. v. M'Daniel et al.*, 6-345.

8. —. A creditor of a corporation, having exhausted his remedy against the company, by judgment, execution and return of nulla bona, may proceed, by bill in equity, against stockholders,

to compel the payment of unpaid subscriptions for stock ; *Wetherbee v. Baker et al.*, 9-547.

8½. PROCEEDINGS FOR, BY CREDITOR. A statute provided for forfeiture of charter and liquidation of corporate affairs, upon evidence of its insolvency by execution returned nulla bona. A creditor of a corporation suing for such forfeiture, before he can demand the provisional appointment of a receiver, or judicial sequestrator, must prove that the corporation is of the special class made subject to forced liquidation under the law ; *Bothick v. Society Termini Dereche*, 7-233.

9. —. A court of equity will, for the benefit of a creditor of an insolvent commercial corporation, compel a stockholder to pay in the amount of capital stock which he has contracted, with the corporation, to take ; *Harmon v. Page*, 9-29.

9½. —. By statute of New Jersey, the chancellor has discretionary power to order a sale of the franchises, as well as of the property, of an insolvent corporation, clear of incumbrances ; *Randolph et. al. v. Larned etc.*, 8-408.

10. MANDAMUS NOT THE REMEDY. The fact that, by their contract of subscription, the stockholders agreed to pay stipulated per centages of the amount of the subscriptions upon call of the directors, does not change the remedy and make more proper a writ of mandamus to compel the directors to call and collect in the sums necessary to pay debts, under the contract. The remedy in equity is more complete, and, where the directors of the corporation refuse to act, and there are numerous stockholders, some dead, others insolvent and others beyond the jurisdiction, and the debts are to many creditors and for various amounts ; the powers of a court of equity are peculiarly adapted to the exigencies of the case, preventing a multiplicity of suits ; *Dalton etc. R.R. Co. et al. v. M'Daniel et al.*, 6-345.

11. RECEIVERSHIP. In case of a proceeding taken to wind up an insolvent corporation, a receiver should not be appointed when it appears that the directors are closing its affairs and that such directors are, in all respects, trustworthy ; *City Pottery Co. v. Yates etc.*, 9-579.

11½. ATTACHMENT AGAINST. If a foreign corporation shall have made a general assignment for the benefit of its creditors, in good faith, it being insolvent, a court of equity will enjoin the prosecution of a suit, commenced by attachment after assignment executed, the writ being levied on property assigned and in possession of the assignee, under its jurisdiction, to prevent the beclouding of title ; *Thorington v. Gould*, 6-147.

12. FOREIGN CORPORATION. An assignee, or trustee, appointed under a statute of a sister state, to take charge of the assets etc. of a dissolved or insolvent corporation of such state, may sue a debtor of the corporation in a state other than that which created the corporation ; *Life Ass'n of Amer. v. Levy etc.*, 7-264.

13. CREDITORS NOT BOUND TO ADJUST EQUITIES BETWEEN STOCKHOLDERS. On bill filed by a creditor of an insolvent corporation, after the return of an execution unsatisfied, to subject property, taken by a former stockholder of the company in exchange for his stock, which property before its exchange, was a trust fund for creditors of the corporation, the court, by its decree, found the property of the company so withdrawn and in the hands of the stockholder liable for the whole debt, instead of charging such property with the stockholder's pro rata share thereof. Held, the decree was proper, and that the creditor in such a case was not bound to see to the adjusting of the equities between the stockholders; *Clapp et al., ex'rs, v. Peterson*, 9-172.

14. UNPAID SUBSCRIPTIONS. In the case of an insolvent corporation, creditors are not compelled to wait for the winding up of the corporation, but may proceed and subject their unpaid subscription to the payment of their claims; but to do so they should first recover a judgment against the corporation, and have execution returned unsatisfied; *Patterson v. Lynde*, 10-239.

15. —. Unpaid subscriptions of an insolvent corporation constitute a trust fund to this extent; if the corporation ceases to do business or if it become insolvent, all assets which it then has, or owns, including paid and unpaid subscriptions, whether in the hand of the original subscriber or of his assignee without notice, become a trust fund for the payment of creditors. Such creditors may follow the property constituting the fund and subject it to the payment of their debts, unless it has passed in to the hand of a bona fide purchaser without notice; *Brant v. Ehlen et al.*, 9-394.

16. —. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable, to an execution against him, individually, as a stockholder, on motion of a creditor of the corporation, in all cases in which the firm would be subject to such liability. *Bray's adm'r v. Seligman's adm'r*, 9-507.

16½. LIQUIDATION UNDER. Where a petition is filed praying, for certain causes alleged, the forfeiture of the charter of a banking corporation, an order of court which does not decree the forfeiture, but, which merely appoints a commissioner to take charge of the assets of the company, can not be construed as directing the liquidation of the affairs of the corporation; *State, ex rel. Morey, v. Judge etc.*, 7-247.

17. TRANSFER OF STOCK. A transfer of stock in an insolvent corporation, which such corporation refuses to make upon its books, is inoperative and void as against creditors existing at the time of the transfer, in the absence of proof that it was made bona fide and to a solvent person; *Centr. Agric. etc. Ass'n v. Ala. G. Ins. Co.*, 9-8.

18. SET OFF IN INSOLVENCY. A stockholder of an insolvent corporation can not set off, against his indebtedness for stock, an indebtedness of the company to him; *Sawyer v. Hoag*, 5-25.

19. STOCK NOTE. A stockholder in an insolvent corporation, who has given his note for an amount remaining unpaid on his subscription for stock, is not, lawfully, bound to pay more of his subscription than may be necessary to satisfy outstanding debts; *Lamar Ins. Co. v. Moore*, 6-390.

20. PURCHASE OF SHARES BY CORPORATION. The funds of an insolvent corporation can not be taken to buy in a portion of its capital stock at the expense of other stockholders. In the state of New Hampshire such purchase is expressly prohibited, under penalty, by general statute; *Currier v. Lebanon Slate Co.*, 8-377.

21. ASSETS. Securities which stand in the name of a corporation, and to which the legal title appears to be in the company, but for which the company has paid nothing and which are not actually corporate property; but which have been taken in the name of the company with the expectation of their becoming its property when it might, thereafter, be able to and actually pay for them; are not bona fide assets of such corporation; *Chi. L. Ins. Co. v. Auditor etc.*, 9-79.

22. —. The good will of a corporation, of whatever value, is not to be accounted an asset of such company. *Id.*

23. ASSESSMENT BY INSOLVENT COMPANY. In an action, by an insolvent corporation, to collect an assessment for the purpose of paying its debts, the interest of the creditors will be so far regarded that no defense grounded on defects in the organization of the corporation can be sustained, unless such objections could have been successfully set up in answer to a creditor's bill against the stockholder to enforce his personal liability; *Ossipee Hosiery and Woolen Manuf. Co. v. Canney*, 5-532.

24. SALE OF EFFECTS. A sale was made to certain creditors of all the effects of an insolvent corporation. If it was for fair price, and especially if its proceeds, whether money or not, were applied to the payment or security of debts, other creditors could not avoid it; and certainly the vendor could not; neither could any stockholder, merely because it operated to hinder some creditors not preferred; *Ashhurst's Appeal*, 4-71.

25. SALE BY RECEIVER. A statute provided that where the property of an insolvent corporation, in the hands of a receiver, is incumbered by mortgages or other liens, the legality of which is brought into question, the court of chancery may order the receiver to sell the same clear of incumbrances etc. It was not intended by the words, "the legality of which is brought into question," to confine the remedy to mischief arising from litigation of any particular character, but to all litigation, between incumbrancers, respecting the validity, extent or priority of their liens; *Randolph et al., trustees, v. Larned, receiver etc., et al.*, 8-408.

26. **COMBINATION OF CREDITORS.** The court can not consent to say that the creditors of a corporation may not combine, for the purpose of protecting themselves, by purchasing the corporate property, when the same is legally brought to sale; provided it is no part of the agreement to prevent competition at the sale, or to use any unfair advantage; *Kitchen v. St. Louis, K. C. & N. Ry. Co.*, 8-199.

27. —. It is not fraudulent for a creditor, or number of creditors, to determine to obtain judgments, on demands justly due from a corporation, subject its property to a sale thereunder by a proper decree and purchase it at such sale. Nor will the simple fact that the debts were bought up by an association of such creditors at a discount of twenty-five per cent., nor the fact that suit was not brought by all the members of the associated creditors but in the name of individual members, render void the judgments obtained. *Id.*

28. **BANKING CORPORATIONS; PRIORITIES OF BILLHOLDERS.** The statute of the state of Georgia, which gives the billholders of a banking corporation priorities over other creditors in the payment of its debts, applies only when there has been a forfeiture of the charter and a receiver appointed by the court; it does not apply to the case of an assignment by a bank of its assets for the payment of its debts, according to the requirements of the law; *Dobbins v. Waltons, assignees*, 1-315.

29. **BINDING EFFECT OF DECREE.** A stockholder in an insolvent corporation is not liable to an action on an assessment, on his stock notes, made by the court in a proceeding by creditors against the company, in which a receiver is appointed, on petition of the receiver and creditors, where he is not made a party to either proceeding. Such an assessment does not bind him; *Lamar Ins. Co. v. Gulick*, 9-109.

See **ATTACHMENT; BANK AND BANKING; CREDITOR'S BILL; DIRECTORS; DISSOLUTION; INSURANCE; PERSONAL LIABILITY.**

INSURANCE.

1. **CONTRACT FOR.** A contract by which one party promises to make a certain payment upon the loss or destruction of some thing which the other party owns, or has an interest in, is a contract for insurance. That the promisor is a corporation, that its promise is only to those who become members of the corporation, and that it has no accumulated funds, out of which to make good its promise, but relies exclusively upon assessments made upon its members, does not change the character of the contract; *State of Kansas, ex rel. etc., v. Vigilant Ins. Co. et al.*, 9-364.

2. **EFFECT OF STATUTORY REGULATION.** A contract of insurance made by a foreign insurance company, which has failed to comply with the conditions prescribed by the statute of a state precedent to the transaction of business therein is void and no recovery can

be had upon notes given to secure the premium charged upon insurance by such company. This rule applies where the policies were delivered and the premium notes executed and delivered, in the state, to a person compensated by the foreign corporation, whether he was an accredited agent of the company or a mere insurance broker; *Franklin Ins. Co. et al. v. Louisville etc. Packet Co.*, 5-386.

3. EXECUTORY CONTRACT. A preliminary contract for insurance, if valid, may be enforced in a court of equity against the insurer, and a policy being by that means procured, an action is maintainable upon it; or the chancellor, in enforcing the execution of the contract, may decree the payment of the amount of the insurance; *Ins. Co. v. Colt*, 5-74.

4. AUTHORITY OF AGENT. Insurer's agent being authorized, after effecting a preliminary contract of insurance, to fill up a blank policy duly signed and attested by the officers of the company, delivered to him for that purpose, is authorized to fill up such policy after a loss has occurred. Being thus filled, the policy becomes the property of the insured and upon a refusal to surrender it, the insured may proceed, by action, to recover the possession of the policy or he may sue upon the policy to recover for the loss and, in the latter case, may prove the contents of such policy upon failure of the company to produce the instrument on the trial. *Id.*

5. —. An agent, of an insurance company, authorized to take and approve risks, and to insure, is, by general usage, also authorized to allow credit for the premium. Its allowance does not impair the validity of the preliminary contract to insure. *Id.*

6. POSSESSION OF POLICY. An express stipulation, made at the time a preliminary contract to insure is effected, that the policy to be issued under it shall, when filled up by the agent, be held for safe keeping by such agent for the assured, precludes the necessity for actual manual transfer to perfect the title of assured. *Id.*

7. VOID CONTRACT. A policy issued in Indiana, by agents of a foreign insurance company, which has not complied with the statute prescribing conditions on which a foreign company may transact business in the state, is void; *Union Cent. Life Ins. Co. et al. v. Thomas*, 5-350.

8. CHARTER CONSTRUED; EXECUTORY CONTRACTS OF INSURANCE. The charter of an insurance company, authorizing the president and directors to make insurance against fire and, for that purpose, to execute such "contracts, bargains, agreements, policies and other instruments," as might be necessary, in the same clause required that every such contract etc. should be in writing or print, and be under the seal of the corporation, be signed by the president and attested by the secretary, or other officer appointed for that purpose. It was held that this requirement of the charter had reference only to executed contracts or policies of insurance,

but not to the initial or preliminary agreements for insurance, preceding the execution of the formal instrument by the officers of the company; *Ins. Co. v. Colt*, **5-74**.

9. **ADJUSTMENT OF LOSS.** A writing signed by the secretary and general agent of an insurance company, notifying the assured of the receipt and acceptance of proof of loss, stating when and where such loss will be payable, and a verbal promise of such secretary and agent, made with knowledge of all the facts in the presence of the president of the company, he not dissenting therefrom, that the loss would be paid at the expiration of the time fixed in the writing, is a binding obligation on the part of the company to pay the amount stated to be due on the adjustment; *Farmers and Merch Ins. Co. v. Chestnut et al.*, **3-246**.

10. **DEFENSE TO PREMIUM NOTE.** It is a good defense to an action on a promissory note, that it was executed and delivered for the consideration of a policy of insurance, which policy was ultra vires and void; *Rochester Ins. Co. v. Martin*, **3-486**.

11. **LICENSE.** The act requiring foreign insurance companies to pay to the city or village, two dollars on the \$100 of the net receipts of every agency in such city or village, is repealed, and no action will lie against such companies or their agent under the act of 1872; *Chicago v. James*, **10-273**.

12. —. The tax or license mentioned in the act of 1879, requires affirmative action by the city or village that may be entitled to it, fixing the rate, which must not exceed two per cent. of the gross receipts of the agency. *Id.*

13. **MAY TAKE APPLICATIONS BEFORE ORGANIZED.** The corporators or promoters of a proposed mutual fire insurance company may take applications for insurance and premium notes as a fund or capital to authorize the granting of a charter and enable the company to do business when organized; but, prior to organization, the making of an application for insurance and giving a premium note therefor, is only a proposition to insure in the company and receive a policy when the company is authorized to transact business; *Gent v. Manuf's Ins. Co.*, **10-211**.

14. **SUICIDE.** A clause in a policy of life insurance providing for a forfeiture in the event the assured should, while sane, take his own life, is the mere declaration of expression of the implication of law; *Supreme Commandery v. Ainsworth*, **10-1**.

15. **STOCKHOLDERS' LIABILITY.** In Illinois, the stockholders of all insurance companies, which are subject to the general insurance statute of 1869, are liable, for the debts of the company, to the full amount of their respective shares of stock, where the full amount of the capital subscribed has not been paid in; *Butler v. Walker*, **5-333**.

16. **MUTUAL COMPANIES — CHARTER.** A mutual insurance company is based upon the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and lia-

ble for the losses. Without a charter, such an organization would be governed by the general rules of law relating to a partnership. When incorporated, they are subject to the terms of their charter. The charter stands in the place of articles of partnership, and modifies the general law as respects profits and losses, but, except as so modified, equity will apply the general laws of partnership in respect to interest in and division of profits; *Carlton v. Southern Mut. Ins. Co.*, 10-171.

17. **MUTUAL COMPANIES — CHARTER.** In such organizations, the idea of mutuality involves the result that each assured becomes interested in profits and liable for losses. *Id.*

18. **DIVISION OF PROFITS.** In such cases, if the surplus fund was in the hands of the company, and it appears that it should have been divided while a member was still insured, and that a division then would have allotted him a part, equity will decree this now. *Id.*

19. **FILE CERTIFICATE.** Until a mutual fire insurance company has fully completed its organization by filing a certificate as required by statute, it is not authorized to do business; *Gent v. Manuf's Ins. Co.*, 10-211.

20. **CHANGE OF ORGANIZATION.** A company, incorporated in New Jersey as a mutual insurance company, can not, by the mere force of one of its own by-laws, change itself to a joint stock company; *State v. Utter*, 3-555.

21. **GUARANTY FUND NOTE.** An insurance company, in the absence of any positive restriction, as an incident to its general powers, has a right to receive a promissory note from one of its trustees, as a part of a guaranty fund, and it is a valid obligation in the hands of a receiver for the benefit of the creditors of the corporation; *Hope Mut. Life Ins. Co. v. Perkins* 3-606.

22. **CONSIDERATION FOR.** It is a good consideration for such note that it was given to induce public credit, and to lead persons to insure with the company. *Id.*

23. **SET-OFF.** Defendant has no right to set off against the note a balance due him from the company on account of interest which the company agreed to pay while the latter retained the note; such right would be in contravention of the contract that the entire principal of the note should be available in the hands of the company for the payment of losses upon policies; it would entirely defeat the object of executing the note and the security of policy holders. *Id.*

24. **LIABILITY OF MEMBERS.** A person becoming a member of a mutual insurance company by insuring therein, is liable for his proportionate share of the losses which may occur while he is a member; that is, for the time during which his policy runs and no longer; *Manlove, rec'r etc., v. Naw*, 4-386.

25. **PARTNERSHIP OBLIGATION.** All persons who effect insurance, in a mutual insurance company, become associated together

in a manner partaking of the nature of limited or special partners; *Krugh v. Lycoming Fire Ins. Co.*, 5-616.

26. **CONTRACT OF MEMBERS.** All persons insured by a mutual insurance company are members of the corporation. The engagement of the members, contemporaneously holding policies, to and with each other, is that they will make good to one another all damages and losses arising from the element insured against; *Planters Ins. Co. v. Comfort*, 5-496.

27. **MEMBERS' LIABILITY.** The insured is only liable, in common with his fellow members, for his proportionate part of such loss or losses as happen while his policy continues; he is not responsible for such losses as occurred before he became a member or after his policy shall have expired. *Id.*

28. **LIABILITY TO ASSESSMENT.** The member's liability to assessment is measured only by the amount of the losses for which the company is at the time responsible. It is not apportionable according to the ratio of the time of the expired and unexpired term of the policy. The assessment can not be reduced, or a part of it withheld, to provide future indemnity for members who have not already suffered loss. Each one who suffers loss is entitled to the full benefit of the pledge of the whole proceeds of the conditional fund, as well as the absolute funds, according to the state of those funds when his loss occurs; *Commonwealth v. Fire Ins. Cos.*, 5-429.

29. **LIABILITY.** A member is liable to assessment notwithstanding his insurable interests or right to recover under his policy; *Comm. v. Ins. Cos.*, 5-429.

30. **ASSIGNEE.** An assignee of a policy who is entitled to its benefits is liable to assessments. *Id.*

31. **UNAUTHORIZED STATEMENT.** In an action upon a premium note given for insurance, parol evidence is not admissible to show that at the time of effecting the insurance, the general agent of the company told the defendant that he had made a special arrangement with the company whereby the defendant would not be liable to pay except in a different manner than stated by him; *Lycoming Fire Ins. Co. v. Langley*, 10-542.

32. **ASSESSMENTS.** It is the duty of the company to show, before making an assessment upon a member, that the loss occurred during the term of the policy of the party assessed, and that all the members under duty to contribute were assessed, and the company should collect by suit, if necessary, the amount due by delinquents, before resorting to a second assessment; *Planters Ins. Co. v. Comfort*, 5-496.

33. **DEFECTIVE ASSESSMENT.** When an assessment upon a deposit note is not made in accordance with the charter, a failure to pay such assessment does not work a forfeiture of a policy issued under the charter. *Id.*

34. **PRIOR FUNDS.** Prior profits ascertained are funds for the

payment of losses notwithstanding they have been credited to policies; *Comm. v. Fire Ins. Cos.*, **5**-429.

35. **INSOLVENCY.** The liability of a policy holder, in a mutual insurance company, to assessment, is not according to the proportion of the unexpired term of the policy, but according to the liabilities of the company. If the losses of the company have rendered it insolvent and an assessment to the full amount authorized by law is made, the holder of an unexpired policy, necessarily cancelled by insolvency, has no right of recoupment or claim for return of premium or for damages on account of the unexpired term of his policy. *Id.*

36. **INSOLVENCY; ASSESSMENT.** Neither the insolvency of the corporation nor the cancellation of its policies will deprive the corporation of the right, or relieve the officers of the duty, to assess upon those who were members, all losses that occurred while they were members. *Id.*

37. **INSOLVENCY; SET-OFF.** When the losses, by a mutual fire insurance company, render it insolvent and require an assessment to the full amount required by law, the holder of an unexpired policy, the cancellation of which has been rendered necessary by such insolvency, has no right of set-off, or of recoupment, or claim for return of premium, or for damage on account of the unexpired term of his policy. *Id.*

38. **INSOLVENCY; CANCELLED POLICY.** The holder of a policy, in a mutual fire insurance company, which was cancelled while the company was solvent and who, by his contract with the company, is entitled to a return premium, has a right, in case of a subsequent insolvency of the corporation and the distribution of assets by receivers, to share in the assets. *Id.*

39. **DOING BUSINESS IN ANOTHER STATE.** The act of the company in doing business in another state, under a legislative act of that state, which required other and special security, does not exonerate the signer of a guaranty fund note from liability thereon, at least so far as relates to policies not issued in such state; *Hope Mut. L. Ins. Co. v. Perkins*, **3**-606.

40. **BENEFIT SOCIETIES.** Although the avowed purpose of the society is benevolence and charity, yet if, in its provisions for assessment of members, form of certificate, etc. it has all the elements of a life insurance company, and is subject to the laws of this state regulating such companies; *Sherman v. Commonwealth*, **10**-452.

41. —. An association which issues to its members a certificate by which the corporation promises to pay a specified amount to the widow of the holder of the certificate, on his death, on consideration that he pays all fees and assessments required by the corporation, has all the essential elements of a contract of life insurance by a mutual insurance company with one of its members; *Supreme Commandery v. Ainsworth*, **10**-1.

42. —. A society or association which requires the payment

of a membership fee, assessments upon the death of a member, a medical examination, and issues a certificate to the holder agreeing upon his death to levy an assessment and pay the proceeds to the beneficiary therein named, is an insurance company. *Id.*

43. **BENEFIT SOCIETIES.** The provisions of an act which exempts from its operations any association "under the supervision of a grand or supreme lodge" refers only to secret associations such as Free Masons, Odd Fellows and the like; *State v. Nat. Ass'n Farmers etc. Mut. Aid Ass'n*, 10-425.

44. **REMEDY AGAINST.** Upon the failure of a mutual benefit association, where the amount of available assets are contingent, to pay the amount due upon the death of a member, whom it has agreed to insure to the extent of a sum certain for each certificate in force, the remedy is by an action for breach of contract. This is especially so where the liability is disputed; *Burland v. Northwestern Mut. Ben. Ass'n*, 7-592.

45. **STATE CONTROL.** The state has a right to say who may engage in the business of insurance and on what terms; and, may proceed, by information in the nature of quo warranto, against any corporation, created under the laws of the state, which without authority assumes to carry on business; *Watt, ex rel. etc., v. Vigilant Ins. Co.*, 9-364.

See **TAXATION.**

INTEREST.

1. **CONTRACT TO PAY.** Between parties unlimited in power to contract, and who do contract for the payment of interest upon a security received in payment or satisfaction of a contract, if the stipulation be part and parcel of the consideration moving toward completing the contract, it will be binding if the contract of which it is parcel, were the consideration and itself were legal; *Pittsburg & Connellsville R.R. Co. v. County of Allegheny*, 4-92.

2. **RECOVERABLE.** Bonds bearing interest upon coupons, payable semi-annually, were issued to a corporation by a county in payment of a stock subscription. The company being thereto specially empowered, contracted to pay interest on the amount of instalments paid on the subscription, and the interest on the bonds and on the stock being equivalent, stipulated to pay the interest coupons. The county, upon default of the corporation, paid the interest. Held, that the company was liable for interest on the coupons thus paid. *Id.*

3. **FROM CAPITAL STOCK.** The payment of interest on stock periodically from the capital before earnings are made, is within a prohibition of a charter against an impairment of the capital by paying dividends not earned. *Id.*

See **DIVIDEND; USURY.**

J.

JOINT STOCK ASSOCIATION.

1. **PROMISE OF SHAREHOLDER IMPLIED.** The implied promise of one holding money for a joint-stock association, in which the interests of the members are represented by certificates, transferable at will, must be understood to be to make payment, to those who are associated, when suit is brought; *Wilson v. Owens et al.*, 5-469.

2. **TREASURER.** The treasurer of an association can not set up, in defense to an action by the members to recover the society's funds, that the purpose and object of the society are unlawful. *Id.*

See CORPORATION.

JUDGMENT.

1. **JOINT.** Where real estate is owned by parties as tenants by entireties, it is not subject to the lien of a judgment or decree in an action where only one is made a party; *Barren Creek Co. v. Beck*, 10-333.

See CORPORATE NAME; DISSOLUTION; EQUITY.

JUDICIAL DISQUALIFICATION.

1. **KIN TO STOCKHOLDER OF CORPORATION IN INTEREST.** A statute (2 Rev. Stat., N.Y., 275, § 2) prohibits a judge from sitting in any cause "in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." To exclude a judge from sitting in a cause by reason of kinship such kinship must exist between him and some person who is actually a party; it is not enough that he is related to some person not a party who is, or may be interested in the cause, wherefore, the fact that a stockholder in a corporation, which is a party, is a relative of a judge within the prohibited degree, does not disqualify the judge from sitting; the stockholder, although interested, is not a party; *In re Dodge & Stephenson Manuf. Co.*, 8-600.

2. **WHAT IS A CAUSE TO WHICH DISQUALIFICATION APPLIES.** It seems that where a judge is interested in any matter brought before him, it will be deemed "a cause," within the intent of the provision of statute disqualifying him because of interest; but the statutory provision, because of kinship, is only applicable to a case where there are parties adverse to each other, or where some question is to be determined between one or more parties. *Id.*

3. —. Consanguinity was not a disqualification at common law; the disability rests wholly upon the statute and can not be extended beyond its terms. *Id.*

4. **INSTANCE.** Upon petition of the trustees and creditors of the Dodge & Stephenson Manufacturing Company, a manufactur-

ing corporation organized in Cayuga county, an order was granted, ex parte, appointing a receiver of said company, in pursuance of the provisions of statutes relating to such corporations in Herkimer and Cayuga (Laws, N. Y., 1852, ch. 361, § 3; Laws 1853, ch. 179) and, on motion of the receiver, an order was granted by the same judge, directing an assessment upon the stockholders. These orders were set aside, on the ground that the judge who granted them was related by marriage, within the ninth degree, to several of the stockholders of the company. This was error, the stockholders not being parties to the proceedings. *Id.*

5. **MEMBERSHIP OF CORPORATION.** A judge is not disqualified to preside at the trial of a cause instituted by persons composing a committee of a corporate body, by reason of the fact that he is an honorary member of such corporation; *Bowman's Ca.*, 8-190.

6. **INTEREST OF JUDGE.** The objection that a judgment has been rendered by a judge in interest, can not be raised in a collateral proceeding. In such proceeding it was held where the justice presiding at a trial had been previously appointed receiver of a corporation, defendant, and had accepted the appointment, that his bias, if any he had, was not a "direct and immediate" interest, to bar him of jurisdiction; *Collins et al. v. Hammock*, 6-143; *Collins et al. v. Garrett*, 6-143.

JURISDICTION.

1. **JURISDICTION OF COURTS.** Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation and can not migrate to another state, but, they are liable to be sued, like natural persons, in transitory actions arising, ex contractu or ex delicto, in any state where legal process can be served; *N. Orl., J. & G. N. R.R. Co. v. Wallace*, 5-490.

2. **JURISDICTION OF COURTS OVER.** The courts of Illinois will exercise jurisdiction in suits by or against corporations, whether created by acts of congress or by the laws of another state, and whether such corporation transacts its business in Illinois or some other state, in all cases, except where they will refuse to entertain jurisdiction in a suit between natural persons; *Missouri R. Tel. Co. v. Nat. Bank*, 5-322.

3. **AS BETWEEN STOCKHOLDERS AND OFFICERS.** A controversy between bona fide stockholders of a corporation, on the one side, and those claiming to be stockholders and president and directors on the other, can only be determined by the courts of the state by which the corporation was created, and, in such controversy, the corporation must be made a party; *Wilkins v. Thorne*, 9-420.

4. **ACTION AGAINST FOREIGN CORPORATION.** A foreign corporation can be sued in the commonwealth of Massachusetts only by means of an attachment of its property; *Andrews v. Mich. Cent. R.R. Co.*, 1-620.

5. **ACTIONS IN FEDERAL COURTS.** A municipal corporation created by a state may, within the limits of the state which created it, be sued in the federal courts by a citizen of another state; *Cowles v. Mercer Co.*, 2-1.

6. **CONSTITUTIONAL LAW.** No state statute limiting the jurisdiction of suits against counties can defeat the jurisdiction given to the federal courts by the constitution. *Id.*

7. **CAUSES REMOVED FROM STATE COURT.** When an action is commenced in a state court, and duly removed to the courts of the United States, by the defendant, under the twelfth section of the act of September 24, 1789, the question of the jurisdiction of this court is not dependent upon any of the provisions of the eleventh section of that act; *Winans v. M'Kean R.R. & Navig. Co.*, 2-103.

8. **APPEARANCE.** A voluntary appearance in the circuit court of the United States, by the defendant, is a waiver of his right to urge as an objection to the jurisdiction that he was not served in the district. *Id.*

See **EQUITY** and **Specific Titles** inquired of.

JUROR.

1. **STOCKHOLDER.** It is not a valid objection to one offered as a juror that he is a stockholder, or director, of a kindred corporation in a case involving a question of interest to a corporation; *Miller v. Wild Cat Gr. R. Co.*, 7-58.

L.

LACHES.

1. **WHEN NOT A DEFENSE.** Laches is not available as a defense to a bill for specific performance of an agreement to convey land, where the plaintiff has been in the continued possession of the premises; *Whitsitt v. Trustees etc.*, 10-223.

See **BONDS**.

LEASE.

1. **CONSTRUED AS TO RIGHTS OF CORPORATION.** Owners of lands leased to a club all their grounds in a certain section, used for a canal and right of way, "for and during the existence of said club," with this clause, "whenever said club shall cease to exist as now organized this lease shall be determined and cease." On the day before the execution of this lease the club passed a resolution to become incorporated and the lessors became members of the club. Held, that the grant of the right of way or canal and its appurtenances did not cease upon the club becoming incorporated under the statute and its assuming all the debts of the same and taking all its property and with the words "as now organized," referred to the purposes of organization and not the mode of organization; *Alexander v. Tolleston Club*, 10-215.

LEGISLATIVE POWER.

1. **LEGISLATIVE PREROGATIVE.** General assembly may exercise all powers not conferred on the general government or which it is not prohibited from exercising by constitutional limitations; *Ruggles v. People of the State of Illinois*, 6-428.

2. —. The legislature, in bringing into existence an artificial person, or corporation, may, at pleasure, endow it with such faculties, or powers, as it may deem proper and for the benefit of the corporators and the public. It may grant or withhold powers at pleasure; but, it is believed, that body is powerless to confer greater or more unlimited powers than are possessed by natural persons. *Id.*

3. **TO CONTRACT.** The power is not in the legislature to dispose of any portion of its legislative powers, so that the succeeding legislature shall find itself possessed of less power than its predecessor; nevertheless, it may, in the exercise of its legislative functions, enter into contracts, by which the state will be bound, to the same extent as individuals. The enacting of such contracts, by the grant of private charters does not, at all, affect the right of the legislature to enact general laws for the better government of corporations and the regulation of their rights and franchises, provided it does not, under the pretense of regulating, substantially impair the rights themselves; *Ward, rec'r, v. Farwell et al.*, 6-490.

4. **RESERVATION IN CHARTER.** The reservation in an amendment to the charter of a corporation of the right in the legislature to bring the corporation under the operation of general laws, does not bind the legislature to enact any specific statute and does not operate as a contract with the stockholders that they will be subjected to any specific additional primary liability on their contracts of subscription. It merely gives a discretion to enact such general statute as the legislature, in its discretion, may deem best for the public good. Such laws may be penal, in their character, as to the liability of stockholders; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

5. **CHANGE OF CONDITIONS.** A constitutional provision that "dues from corporations not possessing banking powers or privileges, shall be secured by such individual liability of stockholders of the corporation, or other means, as may be prescribed by law," was designed to express the reservation of power in general assembly, in granting charters, to provide, from time to time, by legislation, as experience should suggest or wisdom dictate, for the securing of dues from corporations, by individual liability of the corporators, or other means; *Weidenger v. Spruance*, 9-102.

6. **CREATION OF CORPORATE LIFE.** A new corporation may as well be created, by the union, under a new organization, of exis-

tent and distinct organizations as of individuals; *State v. Maine Cent. Ry. Co.*, 7-284.

7. TO RESTRICT POWERS. A statute creating a corporation may impose, upon parties dealing with it, such restrictions as the enacting power may deem proper in applying its assets to the discharge of its obligations and may provide that any one or more of the usual remedies of creditors shall, in certain cases, be withheld from them; *Nat. Shoe & Leather Bank v. Mech. Nat. Bk.*, 9-638.

8. INFERENCE AS TO EXERCISE OF. A legislative intent, upon change or reorganization of a corporation, to absolve it from existing liabilities, or to interfere with corporate contracts can not rest on inference or presumption; *Trustees of University v. Moody*, 6-166.

9. AS TO LIABILITIES. The debts and engagements of a corporation are not the subject of legislative repeal; though the change, or modification, or unconditional repeal of its charter may be within legislative power. *Id.*

10. TRANSFER OF PROPERTIES BY. A transfer of properties may be well worked by legislative enactment, accepted, sanctioned and given effect to by the parties between whom the transfer is made; *Miller et al. v. Lancaster et al.*, 4-170.

11. CONTROL OF STATE. The state has a right to say who may engage in the business of insurance and upon what terms, and may proceed by civil action, in quo warranto, against any corporation, created under the laws of the state, which without authority assumes to carry on the business of insurance; *State of Kansas, ex rel. etc., v. Vigilant Ins. Co. et al.*, 9-364.

12. POLICE POWER. The constitutional power of the federal congress to regulate commerce does not exclude the exercise of concurrent power by the states, except so far as congress has actually exercised its power; *Amer. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

13. PENALTY. It is within the power of a state legislature to enact a statute prescribing a penalty, to be imposed on any agent of a foreign corporation, for acting for such company without a certificate of authority from the state auditor, showing compliance with statutory requirements; so, it is within the power to declare by statute, that any person aiding, in any manner, in transacting the business of any such company shall be subject to such penalty; *Pierce v. People*, 9-213.

14. BANKING. The thirteenth article of the constitution of Kansas applies to banks of issue. It does not prohibit the legislature from creating banks of deposit and discount; *Pape v. Capitol Bank*, 7-130.

15. PERSONAL LIABILITY. The constitution of Illinois (1848, art. 10, sect. 2) not having directed any specific way "in which dues from corporations, not possessing banking powers or privi-

leges shall be secured," and allowing it to be "by such individual liabilities of the corporators as may be prescribed by law," it would seem that any means provided by general assembly for that purpose will meet the requirement. It may, therefore, secure such dues by making the corporators liable, individually; to penalties; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

16. **TAXATION.** Legislative bodies have the power of selecting the subjects of taxation and exempting other subjects which they have the power to tax; to hold out inducements to proposed investment of capital; in the absence of constitutional restrictions. The exemption must be clear and unambiguous; *Scotland County v. Missouri, I. & Neb. Ry. Co.*, 8-159.

17. **PROCESS.** It is for the legislature to determine what shall be a sufficient service of process, for the commencement of an action, subject only to the limitation that the service must be such as may reasonably be expected to give notice to the party proceeded against; *Pope et al. v. T. H. Car etc. Co.*, 9-602.

18. —. The legislature has authority to provide for and authorize the service of process, issued against a foreign corporation, on its agent; *Hiller v. Burl. & Mo. R. R. Co.*, 8-502.

See **CEMETERY COMPANY**; **CHARTER**; **CONSTITUTIONAL LAW**; **DEBTOR AND CREDITOR**; **EDUCATIONAL INSTITUTION**; **EMINENT DOMAIN**; **FOREIGN CORPORATION**; **FRANCHISE**; **LOTTERY**; **ORGANIZATION**; **POLICE POWER**; **TAXATION**.

LIABILITIES.

1. **EFFECT OF GRANT OF PUBLIC WORK.** Where the state has made a grant of a public work to a corporation, the grantees are discharged from those duties to the public, growing out of the work, which the state has been accustomed to perform before the grant, unless there are express words, in the transfer, imposing those duties on the corporation. Even when the state parts with its property, by a gift to a corporation, of its own creation, it is an executed grant, a contract, within the meaning of the constitution, which can not be subsequently revoked or impaired; *City of Erie v. Erie Canal Co.*, 4-68.

2. **LIABILITY OF COUNTY.** A county in Iowa is liable for injuries to a person while traveling on a public highway, resulting from the non repair of a county bridge; *Kendall v. Lucas County*, 2-314.

3. **BUILDING DESTROYED.** A municipal corporation is not, in the absence of a statute, liable to the owners for damages sustained by the destruction of a building to prevent the spreading of a fire; *M'Donald v. City of Red Wing*, 2-549.

4. **WHARVES.** A city which charges and receives wharfage dues assumes the obligation to provide good and safe wharves and to keep the same in repair; and is responsible, in damages, for the

loss of freight while being discharged from a ship, occasioned by the unsafe condition of the wharf; *Fennimore v. City of New Orleans*, 2-371.

5. **LIABILITY FOR DEFECT IN HIGHWAY.** The liability of a town for injury to a traveler from a defect in a highway depends upon proof that the defect caused the injury. If a want of due care on the part of the person injured contributed to the result he can not recover; *Fogg v. Inhab. of Nahant*, 2-484.

6. **RULE APPLIED.** A horse who was being driven with due care over a highway, threw his tail over the rein so as to free himself for a considerable time from the control or guidance of the driver. Before control of him was regained he came upon a defect in the highway, whereby an injury was occasioned. It was held that the town was not liable. *Id.*

7. **NEGLECT TO REMOVE OBSTRUCTIONS FROM STREETS.** The Massachusetts statutes require that highways shall be reasonably safe and convenient for travelers. It is held that this requirement does not necessarily extend to the whole width of the highway as located; that when sidewalks are not made, it is sufficient if there is a carriage way of suitable width, properly constructed and protected; that on each side of this carriage way suitable ditches are allowable; and that beyond these ditches it is not necessary to make provision for the safety of persons traveling in carriages; *Macomber v. City of Taunton*, 2-495.

8. **RULE APPLIED.** The carriage of a traveler, who was driving in the night time over a highway, came in collision with a hitching post. The way was forty feet wide, and was wrought for travel with three carriage tracks and very nearly level from side to side. The post was one of those erected by the owner of the adjoining land upon the outer edge of a strip of way six feet wide between the carriage way and the fence. This strip was used as a sidewalk, but was not separated from the carriage way by any gutters, trees, railing or curbstone. It was held that the town was not liable. *Id.*

9. **NEGLECT TO REPAIR MARKET.** A municipal corporation is liable for injuries resulting from its omissions to exercise proper care to keep a market place, from which it receives an income, in safe condition; *Mayor and aldermen v. Cullens*, 2-132.

10. **TOWN PLATS.** The vacation of any part of a town or city plat, or addition thereto, does not impair the liability of such plat or part thereof for its portion of any existing debts which may have been incurred by the corporation; *Deeds v. Sanborn*, 2-315.

11. **CONTRACT MADE PRIOR TO ORGANIZATION.** Services were rendered to a manufacturing company under a contract made with one who acted as president, after the certificate of incorporation was signed by the members, but before it was recorded, as required by the general law of incorporation, to constitute the company a

corporation. The work was accepted by the company after the incorporation was completed. The company was held estopped to deny its liability to pay; *Grape Sugar etc. Manuf. Co. v. Small*, 5-424.

12. **ARTICLES OF ASSOCIATION AS A CONTRACT.** A corporation is bound to perform the duties prescribed in its certificate of incorporation and a trust deed made thereunder. For any neglect or failure to properly discharge its duty in this respect, it would be liable to a stockholder, who is injured thereby, to the extent of the damages suffered by him; *O'Connor v. North Truckee Ditch Co.*, 9-542.

13. **INSTANCE.** A corporation formed for the purpose of maintaining a water ditch, keeping it in repair and controlling and dividing the water between the several stockholders, is liable to a stockholder injured by neglect or failure to properly discharge its duties in these respects, even though the injury to such stockholder was occasioned by the acts of other stockholders, in diverting more water than they were entitled to under the certificate of incorporation. *Id.*

14. **DURATION OF.** So soon as a corporation has complied with the law as to its organization as a corporation, it becomes and continues to be, so long as it shall exist, subject to suit to enforce its debts; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

15. **ACTION ON LOAN.** Where notes are given to evidence a loan, being given and taken as valid notes, if they be not binding they must have passed under a most material misapprehension and the loan will remain though the notes be not valid, and the original cause of action may be proceeded on; *Castle v. Belfast Foundry Co.*, 7-340.

16. **NOTE.** A corporation is liable on its note, the consideration of which it has received, although the note was executed in pursuance of a contract ultra vires; *Main v. Casserby*, 10-81.

17. **PRIOR PARTNERSHIP NOTE.** An officer of a corporation has no general authority to give the note of the corporation to take up outstanding prior obligations of its members. To do so he should have special authority. Persons taking such notes are bound at their peril to ascertain if such special authority has been conferred; *M'Lellan v. Detroit File Works*, 10-644.

18. —. Where persons as partners gave their notes, and before the same fell due, became incorporated, and after incorporation the president of the company renewed such notes as the notes of the corporation, and made payments therein with corporate funds, held, the corporation was not liable on such notes, there being no evidence that it ever authorized them. *Id.*

19. —. Neither the fact that the proceeds of such notes were included in the assets of the new corporation, nor that some of the payments thereon were made in corporate checks will be sufficient to prove a ratification by the corporation. *Id.*

20. **PRIOR PARTNERSHIP NOTE.** Evidence of payment by the corporation of other debts of the partnership, is not competent. *Id.*

21. —. Evidence that the corporation had formally repudiated the partnership debt, was competent, and should have been admitted. *Id.*

22. **DEBTS; ASSETS.** In equity the property of a corporation is regarded as held in trust for the payment of its debts; and creditors may pursue it in to the hands of all persons except those of bona fide purchasers; *Chicago, R. I. & Pac. R.R. Co. v. Howard et al.*, 1-1.

23. **DIVIDENDS.** It is well settled that the stockholders of a corporation are not entitled to any share of the capital stock, nor to any dividend of the profits until all the debts of the corporation are paid. *Id.*

24. **SALE OF CAPITAL STOCK.** A sale of the capital stock of a corporation, and a division of the proceeds among the stockholders will not defeat the rights of creditors; but such stockholders may be compelled to contribute pro rata to the payment of the corporate debts out of the moneys so received and in their hands. *Id.*

25. **COMPELLING PAYMENT OF DEBTS AFTER WINDING UP.** A corporation wound up its affairs and distributed its assets among the stockholders. Upon a bill for discovery filed by a judgment creditor, held, that so long as the property of the corporation could be traced it was liable for its debts in the hands of members of the association; *Brewer v. Michigan Salt Association*, 10-653.

26. **DEBTS BEFORE DIVIDENDS.** No stockholder is entitled to any of the property of the company until the debts are paid, and he is estopped from denying his liability to the amount of the interest he has received from the company, until such indebtedness is paid. *Id.*

27. **INFRINGEMENT OF PATENT.** The liability for damages arising from the infringement by a corporation of a patent, is not, before judgment is obtained against the corporation, a "debt," within the meaning of the statute, making the officers of a corporation liable for its debts in certain cases; *Child v. Boston & Fairhaven Iron Works*, 10-578.

28. **EXTRA-TERRITORIAL DEFAULTS.** As corporations can only act in conformity with the law of the state by which they are created, such corporations are responsible, as carriers, only to the extent and in conformity to the law of the state, where the contract is made or the duty undertaken, and, it will make no difference whether the action is in form *ex contractu* or *ex delicto*. This is in conformity to the general rule of law upon the subject of contracts and torts, and where railroad companies are sued out of the jurisdiction by which they are created and under whose law alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and

action of such corporation ; *N. Orl., J. & G. N. R.R. Co. v. Wallace*, 5-490.

29. **DAMAGES EX DELICTO.** A statutory provision, declaring that "a corporation can not commit the crime of treason, or any other offense, in its corporate capacity," does not protect corporations from civil prosecutions for damages ex delicto. Corporations have been, and are held responsible for acts done by their agents ex contractu and ex delicto ; *Vinas v. Merchants Mut. Ins. Co. of N. O.*, 7-193.

30. **MALICE.** It would seem, now, to be clear that corporations are liable for all acts, whether willful or malicious, of their agents or servants done in the course of their employment ; *Carter v. Howe Machine Co.*, 7-398.

31. **TORTS.** The doctrine is well settled that a corporation is liable for the willful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence ; and, that the corporation is thus bound, although the particular acts were not previously authorized nor subsequently ratified, by the corporation ; *Terre Haute & Ind. R.R. Co. v. Jackson*, 9-231.

32. —. Strictly speaking, corporations, while acting within the scope of the powers delegated to them, can not be guilty of willful fraud ; yet, it is settled, by a great number of decided cases, that corporations, carrying on trade or business of any kind, are equally and to the same extent liable for the frauds and wrongs of their agents, perpetrated in the course of their employment, as individual principals would be under like circumstances ; *Western R.R. Co. v. Franklin Bk. of Baltimore*, 9-411 ; *Same v. Stein Bros.*, 9-411 ; *Same v. Rous*, 9-411.

33. —. It is as possible for a corporation as for an individual to act maliciously ; that is, with a bad intent. Accordingly, a corporation aggregate may, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as to imply malice, in law, sufficient to support an action. There may be circumstances by which express malice, in fact, might be proved, such as to make such corporation liable in its corporate capacity ; *Vinas v. Merchants Mut. Ins. Co.*, 7-193.

34. —. When the agent of a corporation, acting in the capacity bestowed upon him by such corporation and in discharge of some duty or employment directed by the employer, or incidental to his situation, does an act which causes damage to an individual, the body corporate is responsible. *Id.*

35. —. Corporations, established, in whole or in part, for the pecuniary benefit of the members, are liable in actions for torts, in the same way and to the same extent, as individuals and natural persons ; *Western Un. Tel. Co. v. Eyser*, 5-161.

36. —. A corporation is civilly liable for torts, or for the acts and negligence of its servants or agents, while in its employ-

ment, to the same extent and under the same circumstances, as a natural person. The only limitation being that it is not liable, civilly or criminally, for torts, of which malice is an essential ingredient; *N. & S. Ala. R.R. Co. v. Chappell*, 6-161.

37. **TORTS.** It is not necessary, to fix the liability of a corporation, as a tort-feasor, that the wrongful act, or the negligence, from which the injury proceeds, should have been committed while the corporation was in the exercise of the powers conferred by its charter. It may have been committed while the corporation, or its servants or agents, acting under its authority, were exceeding corporate power, or engaged in business, or transactions, wholly foreign to its nature. *Id.*

38. —. A corporation is liable, the same as a natural person, for the tortious acts of its servants, or agents, in the course of their employment; *Miller v. Pres't etc. of Burl. & Mo. R. R.R.*, 8-325.

39. —. To make a corporation liable for the tortious acts of its employes, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. *Id.*

40. —. When an injury is committed by an employe of a corporation, willfully and of his own malice and not in the course of his employment, the corporation is not bound by his acts. *Id.*

41. **ACTS OF AGENTS.** A corporation is liable for the willful, wanton, or malicious acts of its agents, while acting in the course of its business and of their employment; although the act was neither directly or impliedly authorized, nor ratified by the corporation; *Quigley v. Cent. Pac. R.R. Co.*, 8-343.

42. —. For all acts done by the agent or servant of a corporation, within the scope of the employment and the limits of implied authority, the corporation is liable, however erroneous, mistaken, or malicious, such acts may be; but, for acts done beyond that limit the corporation can not be made liable, unless express authority be shown, or there be subsequent adoption, or ratification, of the act complained of; *Carter v. Howe Machine Co.*, 7-398.

43. **INSTANCE.** Where it was sought to hold a corporation liable for the wrongful and malicious act of its agent, in putting the criminal law in operation against a person, upon charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that there was express precedent authority for doing the act, or that the act had been, subsequently, ratified and adopted by the corporation. *Id.*

44. **TORT OF OFFICER.** Where the general manager of a corporation having authority among other things to collect money on checks, for his company, presents for payment a check for \$300, and through mistake \$800 is paid thereon, the corporation

is liable for the excess so paid, whether the general manager ever accounted to the company for the excess or not; *Kansas Lumber Co. v. Central Bank*, **10-419**.

45. REPRESENTATIONS AS TO SOLVENCY. In this case the corporation was held bound by representations as to its solvency, made for the purpose of floating its paper, by a member of a firm that was both payee and indorser of the paper, and owned nearly all the stock of the company and controlled its operations; *Genesee Co. Sav. Bk. v. Michigan Barge Co.*, **10-624**.

46. —. The liability of a corporation for the acts of one, who, with its assent, has controlled and sold its paper for his own benefit, is the same as that of an individual in like circumstances. *Id.*

47. MALICIOUS PROSECUTION. A corporation is liable to an action for malicious prosecution instituted by its authority; *Boogher v. Life Assoc. of Amer.*, **9-514**.

48. —. An action for malicious prosecution may be maintained against a corporation aggregate; *Carter v. Howe Machine Co.*, **7-398**.

49. SLANDER. A corporation may sanction the publication of a libel. In such case the corporation is the publisher of the libel and liable, in like manner, as an individual; for the reason it has the capacity for voluntary action and is responsible for such action; *Vinas v. Merchants Mut. Ins. Co.*, **7-193**.

50. LIBEL. An action for libel can be maintained against a corporation; *Evening Journal Ass'n v. M'Dermott*, **9-546**.

See ACTION; CHARTER; COMMON CARRIER; CONSOLIDATION; DAMAGES; FOREIGN CORPORATION; LIBEL; MALICIOUS PROSECUTION; NEGLIGENCE; OFFICE AND OFFICER; TRANSFER OF STOCK.

LIBEL.

1. CORPORATIONS MAY BE GUILTY OF. It is well settled that an action for libel can be maintained against a corporation; *Bacon v. M. C. R.R. Co.*, **10-639**; *Evening Journal Assoc. v. M'Dermott*, **9-546**.

2. CORPORATE LIABILITY. A publishing corporation is liable for publishing a libel; *Johnson v. St. Louis Dispatch Co.*, **8-174**.

3. —. A corporation may sanction the publication of a libel. In such case such corporation is the publisher of and liable for the publication of the libel; *Vinas v. Merch. Mut. Ins. Co.*, **7-193**.

4. PUBLICATION. The sending by a railroad company to its agents along its line of road, a circular containing libelous matter, is a sufficient publication; *Bacon v. M. C. R.R. Co.*, **10-639**.

5. INSTANCE. A railroad company supplied certain of its agents with a tabulated list of employes who had been discharged, stating in parallel columns, the name and occupation of the employes, and under the heading "why discharged," the reason. Held, where the reason stated was "stealing," the statement was libelous, and its issue to the agents of the company was a publication. *Id.*

6. ACTION THEREFOR BY A CORPORATION. A domestic corporation may maintain an action for libel; but quære, whether the comity by which a foreign corporation is permitted to bring suit in our courts upon its contracts should be so far extended as to permit a suit for libel; *Hahnemannian Life Ins. Co. v. Beebe*, 1-420.

7. WHAT CONSTITUTES A LIBEL. If an insurance company has procured a charter which authorizes it to pay an interest of thirty per cent. per annum to its stockholders, before laying by a fund for the security of its policy holders, a publication can not be held libelous, merely because it assumes that the company will do, for the profit of its stockholders, that which it has obtained an express power to do, and because it argues that a company, organized under such a charter, must necessarily be unworthy of public confidence. *Id.*

8. —. A free criticism on the charter of an insurance company, or of any other corporation which claims the confidence of the public and seeks the possession of its funds, is to be encouraged rather than repressed, as a means of public security; and it would be against public policy to treat as libelous an article which merely assumes that an insurance corporation proposes to do for its own advantage or that of its stockholders, whatever its charter may expressly authorize it to do. *Id.*

9. —. If, however, the charter contains no authority to do that which is made the subject of criticism, and the company does not propose to do its business in the method which is objected to, the publication may be libelous. *Id.*

LICENSE; see POWERS.

LIEN.

1. ON STOCK. A national bank has power, to make by-laws providing that the shares of its capital stock shall be transferable only on its books, that no stockholder shall be allowed or transfer his stock, while indebted to the bank, without the assent of directors; and that the stock of any shareholder shall be pledged and liable for the payment of any debt due or owing from such shareholder; *Lockwood v. Mech. Nat. Bk.*, 4-140; see *Nat. Bk. v. Lanier*, 3-74.

2. OF CORPORATION ON STOCK. In the absence of contract, or provision of charter or by-law, a corporation has no implied lien on the shares of a stockholder indebted to it, to secure such indebtedness; *Farm. & Merch. Bk. v. Wasson*, 6-538.

3. COMITY. If, by the law under which a corporation is organized, the corporation has a lien on the stock of a shareholder for a debt due from him to the corporation, such lien is a good defense to an action in another state, against the corporation, by a person to whom the shareholder has transferred his stock; *Bishop v. Globe Co.*, 9-468.

4. **EXTENT OF.** The by-laws of a corporation provided there should be no transfer of stock, which was not paid up in full, or by one who was indebted to the corporation, until the transferee, should secure satisfactorily the transferor's indebtedness and, that then all evidences of debt or liability should be surrendered to transferor. The lien of the corporation on the stock covers the liabilities to the company of the equitable owner of the stock; and must prevail over the claim of an equitable assignee of the original owner or transferor; *Planters & Merchants Mut. Ins. Co. v. Selma Sav. Bank*, 6-171.

5. **WAIVER.** Under a charter, the directory of the corporation was empowered to make by-laws and regulations for the control and management of the business and affairs of said company, its property and the mode and manner of transferring its stock. It having been the uniform course of the company to issue certificates of stock which did not contain a notice, required by the by-law, providing for a lien on the stock, such uniform course of conduct must be regarded, at least as to all persons not members of the corporation, as making a by law repealing that providing for a lien and waiving the lien as to any certificates issued not containing such notice; *Bank of Holly Springs v. Pinson*, 8-69.

6. **ESTOPPEL.** If a corporation has a lien on stock, for a debt due from a stockholder, it is not estopped from asserting such lien by the fact that on the presentation of the certificate for transfer, to the person in charge of the transfer book, such person promised to make the transfer and issue a new certificate so soon as a certain officer returned; *Bishop v. Globe Co.*, 9-468.

7. —. No estoppel can arise against the corporation — in this case a bank — from a letter written by its cashier, to the firm which originally held the stock, or to the retiring member of the firm who transferred his interest to his successors, stating that there was no lien or incumbrance on the stock, in favor of the corporation, the letter containing no intentional misrepresentation, and having been written some time before any interest in the stock was acquired by an equitable assignee of the retiring member of the firm. *Id.*

8. **CREDITOR'S LIEN.** Bona fide creditors, as against whom transfers of stock certificates, in private corporations, are required to be registered on the corporate books, are judgment creditors who have acquired a lien. When the lien of an execution has attached before notice — actual or constructive — to the creditor, a purchaser at judicial sale will be protected although he had actual notice of a prior unregistered transfer; *Jones et al. v. Latham*, 9-16.

9. —. The capital stock of an incorporated company is a fund set apart for the payment of its debts and its creditors have a lien in equity. If diverted they may follow it so far as it can be traced and subject it to their claims, except as against holders

who have taken it, bona fide, for a valuable consideration and without notice; *Clapp et al. v. Peterson*, **9**-172.

10. PURCHASER OF PROPERTY. Where a railroad corporation, under authority of law, executes a mortgage, or deed of trust, upon all its property, both real and personal, including its franchise and the same is duly recorded in the several counties through which the road runs, a purchaser of such property, under a valid foreclosure, will take the same free from all subsequent liens and incumbrances. The title will relate back, in respect of this to the date of the record of the security; *Cooper et al. v. Corbin et al.*, **9**-192.

11. TAX ON STOCK. A tax on the capital stock of a railroad company is a tax on personal property. Such tax is not a charge or lien thereon until the tax books are delivered to the collector. *Id.*

12. TAX ON REALTY. Taxes on realty are a lien on the land itself, from and after the first day of May of each year during which they are levied. If not paid, the land may be sold for their payment and the title will pass regardless of any incumbrances resting thereon, whensoever such incumbrances were created. *Id.*

See STOCK AND STOCKHOLDER.

LIFE INSURANCE COMPANY; see FOREIGN CORPORATION;
INSURANCE.

LIMITATION OF ACTIONS.

1. SEALED INSTRUMENTS. The consideration of the conveyance of a grant under seal, which contains no covenant for payment, rests upon a simple contract, express or implied, and a suit for it must, therefore, be begun within the period prescribed for bringing suits on simple contracts; *Coleman et al. v. Second Ave. R.R. Co.*, **3**-603.

2. INSTALMENTS OF STOCK. A right of action to recover instalments of a subscription to the capital stock of such company, made in 1849, but not called for until 1861, did not accrue until such call was made; and such right of action being on a promise in writing, the limitation is fifteen years; *Gibson v. Columbia & N. R. T. & B. Co.*, **3**-665.

3. LIABILITY AS STOCKHOLDER. The probate act of California provides that claims against the estate of a decedent, not filed within ten months after the first publication of notice to creditors to file their claims, should be for ever barred. It was held, that a claim on a liability of decedent as a stockholder in a mining corporation, which accrued prior to his death, and was not filed until after the expiration of the ten months, was absolutely barred; *Davidson v. Rankin et al.*, **1**-199.

4. STATUTE OF MASSACHUSETTS. In that clause of the general

statutes, chapter 43, section 79, which secures to any person aggrieved by the doings of the board of aldermen of the city of Boston, in relation to laying out a way, the right, if his application is merely for the assessment of damages, to apply for a jury within one year after the final determination of any suit wherein the legal effect of these acts is being drawn in question, the words "any suits" embrace only suits to which the applicant is a party, and is bound by the judgment, or the judgment in which is binding on all persons, like a judgment in rem; *Shutt et ux. v. City of Boston*, 2-474.

5. **STATUTE OF NEBRASKA.** As against a foreign corporation the statute begins to run from the date of the presence of its managing agent in the state; i. e. d., there must be the opportunity, during five years before suit brought, for plaintiff to sue defendant in the state and compel it to answer, by service on a managing agent; *Exp. Co. v. Ware*, 5-72.

6. **STATUTE OF NEW YORK.** The courts of New York have decided that a foreign corporation can not avail itself of the statute of limitations of that state; *Tioga R.R. Co. v. Blossburg etc. R.R.*, 4-265.

See **DIRECTORS**; **STATUTE OF LIMITATIONS**; **STOCK AND STOCKHOLDER.**

LIQUIDATION.

1. **HOW EFFECTED.** Where the law provides a method for liquidation of a corporation, that method must be pursued; *In re Louisiana Sav. Bk.*, 10-466.

2. **APPOINTMENT OF LIQUIDATORS.** If the charter provides for liquidators to be chosen by the stockholders, the courts have no power to interfere in the liquidation, nor remove a liquidator so chosen. *Id.*

3. The power to choose liquidators implies a power to fill a vacancy. *Id.*

4. **UNDER INSOLVENCY.** Where a petition is filed praying, for certain causes alleged, the forfeiture of the charter of a banking corporation an order of court which does not decree the forfeiture, but, which merely appoints a commissioner to take charge of the assets of the company, can not be construed as directing the liquidation of the affairs of the company; *State, ex rel. Morey, v. Judge etc.*, 7-247.

LIS PENDENS.

1. **CURATIVE ACT.** An action brought to enjoin the issuing of bonds of a county because of irregularities in the vote which authorized their issuance, and a judgment thereon as prayed, were rendered inoperative as notice to purchasers by a curative act confirming the execution of the bonds; *Lee County v. Rogers*, 1-3.

2. CONTINUOUS PROSECUTION. When three distinct and independent suits are prosecuted, with an interval of one year between the first and second, and of two years between the second and third, the doctrine of *lis pendens* does not apply. *Id.*

LITERARY SOCIETY.

1. WHAT IS NOT. A missionary and benevolent society — as an organization to encourage total abstinence — is not a literary and scientific society; *People, ex rel., v. Young Men's F. M. T. Abst. Soc.*, 6-626.

LOAN ASSOCIATION.

1. ACT CONSTITUTIONAL. The act for the incorporation of loan associations is not unconstitutional, and loans made according to its provisions are not usurious; *Freeman v. Ottawa Building Homest. & Sav. Ass'n*, 10-267.

2. FORFEITURE OF RIGHTS. Where the statute creating the corporation provides for a declaration of forfeiture upon default of a party, and such default being willful and with full knowledge of the consequences, he is entitled to no notice; having lost his rights as a stockholder, loss of money paid on that account follows as an incident. *Id.*

See BUILDING AND LOAN ASSOCIATION.

LOANS.

1. BY CORPORATION. A statute prohibiting a corporation from loaning its funds to any member or officer charged with the duty of investing its funds, is directory merely, and a loan made to such member or officer is valid, and may be enforced by the corporation, notwithstanding the statute; *Bowditch v. New England Mut. Life Ins. Co.*, 10-595.

2. —. Collaterals taken as security for such loan, if taken in good faith and without notice of any fraud, may be held and enforced by the corporation. *Id.*

LOG CORPORATION.

1. DUTIES — LOG COMPANY. Where a corporation was authorized to make certain improvements in a river, and facilitate the driving etc. of logs therein, and was further authorized to take and charge toll for logs driven in such river, held, that the company was bound to furnish to any one paying such tolls, reasonable facilities for driving logs etc.; meaning all the facilities it has acquired and controls, in derogation of the common right; *Lewis-ton Steam Mill Co. v. Richardson Lake Dam Co.*, 10-528.

2. —. The wants or desires of a particular shareholder in such company can not abridge or modify the duties of the company to log owners. *Id.*

3. —. It is not material who may be the owners of lands

upon which the dams of the company are built, so long as the company maintains them for the purposes expressed in its charter. *Id.*

LOST CERTIFICATE.

1. CASUAL FINDING AND PURCHASE. Where a corporation issues its certificate of shares of stock, transferable on the books of the company by indorsement and surrender of the certificate, and its owner loses the same after he has indorsed it, and it comes to the hand of a bona fide purchaser for value, such purchaser acquires no interest in the stock; *Sherwood v. Meadow Val. Min. Co.*, 6-228.

2. REPLACING; INDEMNITY. The loss of one's certificate of the ownership of shares of stock and advertisement of the loss being established the proper officers of the corporation may not refuse to issue a new certificate, on the ground that a bond of indemnity is not furnished. There is no reason for requiring such bond. The stock can not be transferred save upon the books of the company and on the production of the certificates. This is a sufficient protection for the corporation; *State, ex rel. Phillips, v. N. Orl. Gas L. Co.*, 5-404.

LOTTERY.

1. CONSTITUTIONAL PROHIBITION. A constitutional provision that "no lottery shall be authorized, nor shall the sale of lottery tickets be allowed," has reference only to future authorization by the legislature. It could have no effect to abridge, impair or annul a lottery right, franchise or privilege granted by charter, or act of incorporation, by a precedent territorial government; *Kellum v. State*, 7-93.

2. —. The territorial legislature of the Indiana Territory had full and ample power to incorporate a university with perpetual succession, and to endow it with the power and privilege of raising a fund, of a certain specified amount, by a lottery scheme, for the purpose of procuring a library and philosophical and experimental apparatus. *Id.*

See CHARTER; POLICE POWER.

M.

MALICE.

1. CORPORATION MAY BE GUILTY. It is as possible for a corporation as for an individual to act maliciously — that is, with a bad intent. Accordingly, a corporation aggregate may, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as to imply malice, in law, sufficient to support an action; *Vinas v. Merch. Mut. Ins. Co.*, 7-193.

2. **CORPORATE LIABILITY.** A corporation may be liable in an action of tort, even when a fraudulent or malicious intent in fact is necessary to be proved; the fraud or malice of its authorized agent being imputable to the corporation; *Reed v. Home Savings Bank*, 7-544.

3. **LIABILITY.** *Semble*, it is clear that corporations are liable for all acts, whether willful or malicious, of their agents or servants, done in the course of their employment; *Carter v. Howe Mach. Co.*, 7-398.

4. —. For all acts done by the agent or servant of a corporation, within the scope of the employment and the limits of implied authority, the corporation is liable, however erroneous, mistaken or malicious such acts may be. For acts done beyond that limit the corporation can not be made liable, unless express authority be shown, or there be a subsequent adoption or ratification of the act complained of. *Id.*

5. —. A corporation is liable for the willful, wanton or malicious acts of its agents, while acting in the course of its business and of their employment, although the act be neither directly or impliedly authorized nor ratified by the corporation; *Quigley v. Cent. Pac. R.R. Co.*, 8-343.

6. —. A corporation is civilly liable for torts or negligences of its servants or agents, while in its employment, to the same extent and under the same circumstances as a natural person. The only limitation being that it is not liable, civilly or criminally, for torts, of which malice is an essential ingredient; *N. & S. Ala. R.R. Co. v. Chappell*, 6-161.

7. —. Where an injury is committed by a corporate employe, willfully and of his own malice and not in the course of his employment, the corporation is not bound by his acts; *Miller v. Pres't etc.*, 8-325.

See **LIABILITIES.**

MALICIOUS PROSECUTION.

1. **ACTION MAINTAINABLE.** Action for malicious prosecution may be maintained against a corporation aggregate; *Carter v. Howe Mach. Co.*, 7-398.

2. **CORPORATE LIABILITY.** A corporation, like a natural person, is liable, to an action of trespass on the case, for a malicious prosecution conducted by its officers and agents; *Williams v. Planters Ins. Co. et al.*, 8-64.

3. —. As the result of the modern cases, it seems to be the law that where corporations have been held liable for the malice of their agents, the acts of the latter were not only within the scope of the supposed authority of the particular agent committing the act complained of, but the act performed by the agent was done in performance of business coming within the purview of the objects and powers for which the corporation was created

and the powers were conferred by the charter; *Gillett v. Missouri Valley R.R. Co.*, 8-103.

4. **CORPORATE LIABILITY.** In this case, it was held that a railroad corporation was not liable for a malicious prosecution, instituted by its agent, against one of its employes — a clerk — in the name of the state, for alleged embezzlement of funds; there being no pretense that any power was given the company to engage in such public prosecutions or that they came within the scope of its general powers or purposes. *Id.*

5. —. **ADAMS, j.**, dissenting, held that where a corporation — in this case a railroad company — through the malice of its officers, institutes a groundless prosecution, it should be made to respond in damages to the party injured, in an action for malicious prosecution. *Id.*

6. —. Also, that the prosecution of offenders against the criminal law, especially when, by reason of insolvency, not responsible in a civil action is not only within the scope of the authority of a corporation carried on mainly for profit, but becomes the imperative duty of such corporation. *Id.*

7. **MISJOINDER OF COUNTS.** That some counts in the declaration aver imprisonment, in consequence of a malicious prosecution, neither converts the action into trespass nor constitutes misjoinder; *Williams v. Planters Ins. Co. et al.*, 8-64.

MANDAMUS.

1. **POWER OF THE WRIT.** The writ of mandamus does not purport to adjudge or decide any right. It is the mode of compelling the performance of acknowledged duty, or enforcing an existing right, rather than deciding what the right or duty is; *Burland v. North Western Mut. Ben. Ass'n*, 7-592.

2. **NATURE OF WRIT.** The appropriate remedy in respect of injuries received at the hands of private corporations is at common law. The writ of mandamus is a discretionary writ and should not, usually, issue save to settle some controversy of importance on public grounds or which, by its nature, would justify the interference of the court if corporate powers did not exist; *Lamphere v. Grand Lodge, A. O. U. W.*, 7-594.

3. **DISCRETIONARY.** The granting of writ of mandamus is in the discretion of the court and an order refusing it is not reviewable on appeal; *Sage et al. v. Lake Shore & Mich. South. Ry. Co.*, 8-500.

4. **QUALITY OF THE WRIT.** The writ of mandamus is not a writ of right. It is only to be granted at the discretion of the court. This process was not intended, and is not well adapted, for the trial of mere questions of property; *Murray v. Stevens et al.*, 4-447.

5. **REQUISITE TO RELIEF.** To entitle a party to a writ of mandamus, he must be clothed with a clear legal and equitable right

to the thing which is withheld; *State, ex rel., v. M'Iver et al.*, 4-160.

6. **STATEMENT OF CASE.** To entitle a relator to a writ of mandamus, he should make a case clearly showing his right thereto. An ambiguous statement leaving it doubtful is not sufficient; *People, ex rel., v. German U. Evang. Church*, 4-594.

7. **WHEN IT WILL ISSUE.** Though it is true that a writ of mandamus will not issue, unless the duty to be performed is one in which the public has an interest, and, not even then where the party demanding the writ has another plain and adequate remedy, yet the duty of the officers of a railroad corporation, to permit the transfer of its stock, is one in which the public has a sufficient interest to warrant the court in issuing the writ; to compel its performance and the remedy by action, against the officers of the corporation, to recover damages for their refusal to permit the transfer, is of such doubtful and uncertain character that it can not supersede the specific and more speedy remedy by mandamus; *State, ex rel. v. M'Iver et al.*, 4-160.

8. **WILL ISSUE TO A RAILROAD COMPANY.** A railroad corporation, chartered by a state, is a public corporation to the extent that it and its officers owe duties to the public, which they may be compelled to perform, by writ of mandamus. Among these duties is that which relates to the capital stock of the company and its control of the transfer thereof. *Id.*

9. **SUPREME COURT OF SOUTH CAROLINA.** The supreme court of South Carolina has authority, by virtue of the power conferred by section 4 of article 4 of the constitution of that state, to issue writs of mandamus upon original application and independent of its jurisdiction as an appellate court. *Id.*

10. **IN MASSACHUSETTS.** Mandamus lies to enforce the right of the member of a board to the exclusion of a person whom the other members wrongfully recognize and permit to act in his stead; *Conlin v. Aldrich et al.*, 2-461.

11. **TO RESTRAIN ACTS OF UNAUTHORIZED PERSONS.** In the state of Maryland, mandamus is the proper remedy to restrain commissioners who have assumed to act without lawful authority from the discharge of the duties of their supposed office; *State of Maryland, ex rel., v. Kirkley et al.*, 2-406.

12. **TO ENFORCE PAYMENT OF COUNTY BONDS.** Where the alternative writ of mandamus recited the execution of the negotiable bonds of the county, their maturity, the levy and collection of a tax to pay them, and the refusal of the treasurer to make the payment as stipulated in the bonds, held, that the remedy of the holder was by action against the treasurer, on his official bond; that this was an adequate remedy at law and, for this reason, the writ should be quashed; *State, ex rel., v. M'Crillus*, 2-319.

13. **ORDER BY COMMISSIONER.** It was held further, that, when the county commissioners made the order directing the levy of

the taxes, their powers ceased, and a subsequent order directing the treasurer to make no payment on the bonds was a nullity, having no effect upon the rights or duties of the parties. *Id.*

14. **WHERE IT LIES.** Where a corporator in a corporation has a clear legal right which has been violated by the corporation, and he has no other adequate remedy, he is entitled to relief by mandamus; *State, ex rel., v. Georgia Medical Soc.*, 1-328.

15. **TO COMPEL REPORTS.** One, or more, of the stockholders of a corporation, may compel its officers, by mandamus, to make and publish reports required to be made, by them, by the statute of incorporation; *Smith & Crittenden v. Steele*, 8-322.

16. **ILLEGAL ELECTION.** A mandamus may issue on the petition of a corporation against persons claiming to hold its offices, by virtue of an election at which illegal votes were cast, by means whereof a minority of the stockholders have usurped the power of government; *Amer. Railway Frog Co. v. Haven et al.*, 3-418.

16½. **ENFORCING ELECTION.** In case the proper officers of a manufacturing company refuse to perform the duty imposed upon them, to call an election for directors, a stockholder has a remedy, by mandamus, to compel such performance; *People, ex rel. Miller, v. Cummings et al.*, 8-514.

17. **ELECTION NOT CALLED.** When a board of president and trustees, elected for one year and until their successors shall be elected and qualified, has neglected to give notice at an annual election of their successors, as required by law, within the year, for which they were elected, and refuse to do so afterward, a mandamus will be awarded requiring and compelling the board to call such election; *People etc. v. Trustees etc.*, 3-253.

18. —. By statute of Nevada, the first annual meeting of an incorporated company was required to be held six months after the recording of the certificate of incorporation; at which meeting trustees to take the place of those named in the articles of association were to be elected. No such meeting having been called, by the trustees in office, and demand having been made by relator, that it be called, and refusal having been given; held, that a writ of mandamus should issue, directing that the annual meeting, for the election of trustees, be called according to law; *State of Nevada etc. v. Board of Trustees*, 3-549.

19. **INJUNCTION IMPROPER; WHEN ISSUED.** A mandamus will issue to correct the abuse of granting an injunction and appointing a receiver, upon an *ex parte* application, by which to take the control and management of corporate affairs from the directors; except under proceedings to wind up the corporation; *People, ex rel. v. Judge of etc.*, 5-478.

20. **ISSUE OF STOCK CERTIFICATE.** If there appear to be no special denial of the obligation to issue certificate of stock in lieu of one lost, the owner may compel such issue by mandamus, the

ownership not being disputed; *State, ex rel., v. N. O. Gas Light Co.*, 5-404.

21. —. The weight of authority inclines against the right to employ mandamus to compel a corporation to issue certificates of stock, if the petitioners for the writ can receive full indemnity by purchasing other shares in the market and recovering the price thereof, against the corporation, in an action at law; *Townes v. Nicholls et al.*, 9-379.

22. ONLY ON CLEAR RIGHT; WHEN NOT LIE. Mandamus does not lie, unless the petitioner's right to the possession of the shares of stock is clear. If the right claimed be a doubtful one, involving the necessity of litigation to settle it, the remedy by mandamus must be denied. *Id.*

23. INSTANCE. Petitioner claimed to have shares issued to him by virtue of a certificate given him, by the officers of the corporation, as follows: North Castine Mining Company. This certifies that Charles N. Towne is entitled to two hundred shares in the company, deliverable according to the special agreement between the holder and the company. According to said agreement, this certificate is not transferable. A controversy existing between the parties, as to their legal rights, the petition for mandamus must be denied. *Id.*

24. TRANSFER OF STOCK. A purchaser of shares in a corporation, at a sale for the non payment of an assessment thereon, is not entitled to a writ of mandamus directed to the officers of the corporation, to compel a transfer to be made on its books and a certificate issued to him; *Stackpole et al. v. Seymour et al.*, 7-495.

25. —. Mandamus is not the remedy of one who claims shares of stock which the corporation refuses to transfer to him, in the absence of a showing that the particular shares, or certificates, have a peculiar value; i. e., any value beyond that of the same number of other shares of the corporation; *State of Nevada, ex rel., v. Guerrero et al.*, 8-354.

26. —. Mandamus ought not to issue to compel trustees of a corporation to issue certificates of stock to a claimant where it appears, from his petition, the stock is also claimed by others not parties to the proceeding. *Id.*

27. TRANSFER OF STOCK JUDICIALLY SOLD. The writ of mandate lies to compel a transfer of corporate stock upon the books of the corporation; when the law makes it the duty of the corporate officers to make the transfer; wherefore, when there has been a levy upon and a sale of shares upon a proper judgment and, it is made the duty of the sheriff who sells to make transfer on the corporate books, the writ will issue to compel the corporate officers to afford him access to the books; *State, ex rel., v. Nat. Bank et al.*, 9-293.

28. DESCRIPTION OF STOCK IN THE WRIT. It is a sufficient de-

scription of stock levied upon and sold on execution, in an alternative writ of mandate to compel a transfer, to specify "ten shares of the capital stock of said corporation," then the property of a person named. *Id.*

29. **TRANSFER OF SHARES.** A petition for mandamus, to compel a transfer of shares of stock by a corporation to the petitioner, will not be granted if the petitioner can be indemnified for the refusal in an action at law, by the recovery of damages; *Murray v. Stevens et al.*, 4-447.

30. **AVERMENT OF DEMAND AND REFUSAL.** Application for mandamus to compel the transfer of stock in an incorporated company to a vendee. To entitle the relator to the writ, it is necessary to show a demand and refusal. It is not essential the word "refuse," or any equivalent, should be used, but, there should be enough, from the whole of the facts, to show the court that, for some improper reason, compliance is withheld, and that there exists a distinct determination not to do what is required; *State, ex rel., v. M'Iver et al.*, 4-160.

31. **RETURN; PLEDGE.** A return to an alternative writ of mandate, issued to compel a corporation to permit a transfer of stock sold under execution, by the corporation — in this case a bank — that before levy one, who is named, held and still holds the certificate of stock in pledge to indemnify him as surety for the owner upon an unpaid indebtedness, is bad on demurrer; so, also, that the owner of the stock was, before the levy, and still is indebted to the corporation in a sum exceeding the value of the stock and that in such case a by-law of the bank forbids a stockholder to transfer his stock; *State, ex rel., v. Nat. Bk.*, 9-293.

32. **TO VACATE INJUNCTION.** An injunction having issued to restrain an action at law to recover the amount of dividends declared upon stock in a corporation, it appeared that an attachment had been attempted to be levied on the shares. * These shares stood in the name of a person, assignee of the attachment creditor and there was no warrant of statute for such levy. Mandamus should issue to cause the vacating of the injunction, motion to dissolve having been overruled; *Van Norman v. Circuit Judge*, 6-663.

33. **EXPULSION.** Mandamus was properly issued to cause the restoration of members wrongfully suspended from a board of trade; *Sav. Cotton Exch. v. State of Georgia*, 6-343.

34. — . When a member has been expelled from a corporation for no legal cause, mandamus lies against the corporation to compel it to restore him to membership; *State, ex rel., v. Ga. Med. Soc.*, 1-328.

35. — . If a corporator be excluded from the proper enjoyment of the property of the corporation for religious worship and instruction, or, if he be prevented from exercising his right to vote, when entitled to such right by the statute, he can maintain

an action and he has an adequate remedy for the injury against the persons guilty of the wrong. Therefore, mandamus will not lie; *People, ex rel., v. German U. Evang'l Church*, 4-594.

35½. **EXPULSION.** A mandamus will not lie to compel a religious society to restore to its membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some one or more of the laws of the society. The civil courts will not revise the ordinary acts of church discipline, or the administration of church government; *State, ex rel., v. Hebrew Congregation*, 7-239.

36. —. Courts never interfere to control the enforcement of the by-laws of merely voluntary associations, incorporated for the advancement of religious, moral, or social principles, or merely for amusement. Such organizations must be left to enforce their rules and regulations by such means as they may adopt for their government; *People, ex rel., v. Board of Trade*, 6-365.

37. —. Mandamus to compel restoration to membership in a corporation was denied, with costs, where the relator, who was excluded for non payment of dues, but, by proceedings of doubtful validity, had practically acquiesced and did not tender payment or seek to be re-instated for upward of nineteen years; *Bostwick et al. v. Fire Department*, 9-484.

38. **REMEDY AT LAW.** Mandamus is not the proper remedy where petitioner for the writ has a plain, speedy and adequate remedy at law; *State of Nevada, ex rel., v. Guerrero et al.*, 8-354.

39. —. Where a party injured has an ample remedy by an action at law, as where a corporation refuses to transfer stock on its books, mandamus will not lie; *State, ex rel., v. Rombauer*, 3-541.

40. **DISCRETIONARY POWER.** Discretionary power vested by statute in an officer can not be controlled by mandamus; as to compel the attorney general to proceed for a forfeiture of charter, which the state may not choose to demand; *State, ex rel., v. Att'y Gen.*, 7-221.

41. —. Mandamus is not the proper remedy to compel directors to call and collect in capital, due upon subscriptions made, for the payment of debts; *Dalton etc. R.R. Co. et al. v. M'Daniel et al.*, 6-345.

42. **NON DELIVERY OF BOOKS.** Mandamus is the proper remedy, on the refusal of an officer to deliver over to his successor, the records, books and papers pertaining to the office; *Fasnacht v. German Assoc.*, 10-330.

43. **TO PRODUCE ACCOUNTS.** By statute of Connecticut, joint stock corporations are required to keep all books of account, of such corporations, open for the examination of stockholders, at the town within said state in which the corporation is located, or at the office of the treasurer in such state. So, where the company's manufactory was located in the state but its principal office

for the sale of its wares was in New York, it was held that its books of account should be kept at its office in Connecticut. Nevertheless it would not be prohibited from keeping books of account in New York and mandamus would not issue to compel their production in Connecticut, at the suit of a stockholder who does not show some injury to himself; *Pratt v. Meriden Cutlery Co.*, 3-103.

44. **CONTRACTOR'S RECOURSE.** Contract to perform work on streets, expressly stipulating, on the part of the contractor, that he will look for payment only to the proceeds of special assessments already levied, or to be levied, making no claim against the corporation, except as upon the collection of such assessments. Mandamus will not issue to compel the city to some other mode of payment, it appearing that the corporation is, in good faith and with reasonable diligence, collecting by means of such assessments; *City of Chicago v. People, ex rel.*, 2-192.

45. **WHO MAY BE RELATOR.** In a matter concerning public improvements, a writ of mandamus should be denied, when the relator, a mere individual tax payer, has no other interest in the subject matter than the public generally; *People, ex rel. v. Board of Supervisors*, 2-162.

46. **PARTIES.** The alternative writ of mandate, to compel officers of a corporation to permit a judicial transfer of stock sold under execution, properly makes officers of the corporation, in charge of the transfer books, parties if it be shown such officers refused to allow the sheriff access to said books for the purpose of making the transfer; *State, ex rel., v. Nat. Bk.*, 9-293.

47. **MOTION TO QUASH.** A motion to quash an alternative writ of mandamus, granted after argument upon notice, will not be entertained; *State, ex rel., v. Penn. R.R. Co.*, 8-393.

48. **MODE OF SERVICE.** Strict compliance with the rules of practice requires that if a writ of mandamus be directed to one person, it should be served by delivering the original to him; if directed to several the original should be delivered to one and copies served on the others. The court will, however, refuse to set aside the service because of the failure to leave the original with the person to whom it is directed, if a correct copy is delivered. *Id.*

49. **DIRECTION TO CORPORATION.** If the duty commanded is incumbent upon a corporation, the writ should be directed either to the corporation or to the select body within the corporation, whose province and duty it is to perform the particular act or to put the necessary machinery in motion to secure its performance. *Id.*

50. **SERVICE ON CORPORATION.** Writ of mandamus must be served upon the officers of the corporation who have the power and whose duty it is to execute it and against whom an attachment to enforce obedience may issue. *Id.*

51. —. Service upon one who is a mere employe and agent

of the company, having only delegated powers and specified duties to perform, is insufficient. *Id.*

See CHURCH ORGANIZATION ; CORPORATE RECORDS ; ELECTION.

MANUFACTURING COMPANY.

AQUEDUCT COMPANY. An aqueduct corporation, whose business consists in furnishing a city with a supply of water, is not a manufacturing corporation within the meaning of the tax acts of the commonwealth of Massachusetts ; *Dudley v. Jamaica Pond Aque. Assoc.*, 1-621.

MARKETS.

1. **POWER TO ESTABLISH.** The power conferred upon municipal corporations to erect, establish and regulate markets and market places must be exercised in such manner as to be reasonable and uniform throughout the limits in which it has operation, must not operate as a restraint upon trade, or to create oppressive monopolies, and must be calculated to advance the general welfare of the inhabitants ; *City of Bloomington v. Wahl*, 2-150.

2. **REASONABLE EXERCISE OF POWER.** It seems that the corporation may erect market houses, and provide for their regulation by reasonable by-laws, and also designate reasonable boundaries, and prohibit the sale therein, during market hours, of all articles usually sold in markets ; but the hours within which all such articles are required to be sold in market should be regular and reasonable. An ordinance requiring that all such articles shall be brought to and sold in one place, and prohibiting the sale of the same in any quantity and at any time at any other place, is a restraint upon trade, creates a monopoly oppressive to the people, and is void. *Id.*

MARRIED WOMEN.

1. **SUBSCRIBER FOR STOCK.** Even if, in Illinois, a married woman can enter into a contract so as to be bound as a member of an association for business purposes, her husband can not, without authority from her, make a binding contract for her, by signing her name to articles of association ; *Boyd v. Merriell*, 3-260.

MEETINGS.

1. **BOARD OF COMMISSIONERS.** The board of commissioners of L. county, Nevada, met on the 1st of day of April, and on that day adjourned until Saturday, the 6th day of April, when another adjournment was made until the 6th day of May. On the 2d day of April the legislature passed an act requiring the county boards to levy the annual taxes before the third Monday of April in each year, which fell on the 15th of April in that year. This practically required a levy on or before Saturday, the 13th. On Monday, the 8th of April, the members of the board assembled and entered an order directing a special meeting to be held on Saturday,

the 13th. That order was published in a newspaper from that day until the 13th, which was less than a week, the time prescribed by law for the publication of such notice; Held, that the legislative requirement, that the taxes should be levied within a time which rendered the publication for a week impossible, was a dispensation of the publication; *State of Nevada v. Manhattan Silver Min. Co.*, 2-607.

2. **QUORUM.** If the charter of a corporation be silent as to the number of its managing officers necessary to constitute a quorum for the transaction of business, the common law rule prevails, and a majority of all such officers must be present; *Blackwell v. State of Arkansas*, 6-210.

3. **POWER OF A MAJORITY OF A QUORUM.** At a meeting of directors, at which the execution of a mortgage of defendants' realty and fixed machinery was authorized, three directors were present, two of whom concurred in the adoption of the resolution. Five members constituted the board of directors, of which number three were a quorum. Held, that the mortgage was authorized, a quorum being competent to act and two being a majority of the quorum, wherefore, the mortgage was valid; *Wells et al. v. Rahway White Rubber Co.*, 3-592.

4. **POWER TO CONTRACT.** Generally, a stockholders' meeting would not be authorized to contract on ordinary matters of the corporate business, such ordinary management being with the directors; *Star Line v. Van Vleit*, 6-649.

5. **INVESTIGATING OFFICIAL ACTS.** Where the purpose is mainly to investigate what has been done, under the superintendence of the directors of a corporation, it is competent for the holders of a majority of the stock at a stockholders' meeting to provide for the investigation; to appoint a committee to conduct it and to authorize the appointment of experts to make it; and, the company will be liable for reasonable compensation to such employees. *Id.*

6. **DIRECTORS' MEETING, POWER TO ACT.** In case of a definite body, like a board of bank directors, a majority must be present, at a regular meeting or at a special meeting, notified according to by-law, if there be any, or otherwise reasonably notified to all the members (except, perhaps, cases of absence at a distance), without fraud or attempt at surprise, and, at such meeting a majority of those present can act for the whole, and, the meeting will be presumed to be regular unless the contrary appears; *Lockwood v. Mechanics' Nat. Bank*, 4-140.

7. **IRREGULARITY.** Mere irregularity in the vote of directors, as that one voted by proxy, does not warrant the interference of a chancellor to prevent the consummation of a resolution; *Dudley v. Kentucky High Sch.*, 5-382.

8. **WHEN A DIRECTORS' MEETING IS A STOCKHOLDERS' MEETING.** Under a statute requiring the concurrence of the holders of two-thirds of the stock of a corporation to mortgage the corporate

property, for a loan of money, to be expressed at a meeting of the stockholders called by the directors for that purpose, a meeting of the directors, who are the only stockholders except one, at which all assent to the proposition, is in effect a meeting of the stockholders and the act of the directors that of the stockholders. The requirement of the concurrence of the holder of two-thirds of the stock, is intended for the protection of the stockholder, and is a matter in which the public have no interest; *Thomas v. Citizens Horse Ry. Co.*, 9-189.

9. AS TO THIRD PARTIES WHEN ADOPTED BY DIRECTORS. A by-law adopted by a board of directors, providing the manner in which special meetings may be called, does not affect the validity of the acts of the board in disregard of it, especially where third persons are concerned; *Samuel v. Holladay*, 1-139.

10. CALL. Where the by-laws of a corporation provide that meetings of the stockholders shall be called by the trustees, the action of the board of trustees is necessary to that end, and the president of the company has no power to convene a legal meeting; *State of Nevada, ex rel., v. Pettinelli et al.*, 5-516.

11. INSTANCE. Plaintiff's charter provided that the first meeting of the corporators should be called, by publication, at least fifteen days prior thereto. Fourteen days' notice of meeting was, in fact, given. Held, that if neither the grantor of the charter (the state) nor the grantees (the corporators) complain of the defect in the preliminary notice, the objection could not, subsequently, be raised by a stockholder in a suit, by the corporation, against him to recover an assessment; *Ossipee Hosiery etc. Co. v. Canney*, 5-532.

12. BY-LAWS AS NOTICE. Under a legislative act providing for an annual election of officers by stockholders a by-law was adopted that the annual meetings of the stockholders shall be held on the third Monday in April, at etc. This is not, per se, notice of the time of holding such meeting; other and formal notice is essential to designate the time of the day on which such meeting shall lawfully convene; *San Buenaventura Comm'l M. & Manuf. Co. et al. v. Vassault*, 6-229.

13. CONSTRUCTION OF STATUTE AS TO NOTICE. A statute of incorporation which provides for an annual election by the stockholders, at such time and place and upon such notice as shall be directed by by-laws, pre-supposes notice in some authentic and legal mode; wherefore, no legal meeting for such purpose, can be held without such notice, unless all the stockholders be actually present, in person or by proxy, consenting. *Id.*

14. SPECIAL. Notice of a special meeting of stockholders, called upon an emergency, for the transaction of particular business, should specify the occasion of the summons and the business proposed to be transacted; *Stockholders v. Louisville, C. & L. R.R. Co.*, 7-164.

15. **TIME OF NOTICE.** Where an act is authorized by law to be done, if ratified by the stockholders, and no manner is provided for notifying them, the manner prescribed by charter must be pursued, and a notice published for a less number of days will not warrant any action. *Id.*

16. **SPECIAL, OF DIRECTORS.** Action to foreclose a mortgage, purporting to be the deed of a corporation. The deed was executed by virtue of a resolution adopted at a special meeting of the directors, at which three or five were present. The record of the meeting recited "written notice having been served upon each director." It was claimed there was no evidence of such notice as is required by statute. The action of the board was regular and binding on the corporation; and, if proper notice was not given, the burden is on him who denies it was so given; *Granger v. Original Empire Mill & Mining Co.*, 9-27.

17. **NOTICE OF SPECIAL.** The civil code of California (§ 320) does not require that notice of a special meeting of directors of a corporation shall specify the purpose of the meeting. It is all sufficient that it states that the meeting will be held, naming place and time. *Id.*

18. —. Every member of a board of directors had notice of a special meeting and was in attendance. Held, that as to whether the notice was given verbally or in writing was immaterial; *Samuel v. Holladay*, 1-139.

19. —. It being shown that a special meeting of the board of directors of a company was held and that a quorum of its members attended, it will be presumed, in the absence of evidence to the contrary, that due notice of the meeting was given to all the directors and that all the necessary steps were taken to constitute it a valid meeting; *Choteau Ins. Co. v. Holmes' administrator*, 8-175.

20. **PRESUMPTION AS TO NOTICE.** In the absence of all recital from the corporate record of a special meeting of directors, it will be presumed, the contrary not being proven, that the meeting was regularly called. *Granger v. Orig'l Empire M. & M. Co.*, 9-27.

21. **NOTICE OF MEETING.** When it does not appear notice of a legal meeting to act upon consolidation was given, proof of perfected consolidation is not made; *Rodgers v. Wells*, 6-654.

22. **BOOKS OF CORPORATION.** The books of a corporation, are prima facie evidence as to the person who possesses the right to vote at a meeting of a corporation; *Hoppin et al. v. Buffum et al.*, 4-151.

23. **RIGHT TO VOTE AT.** The legal holder of stock in a corporation in whose name the stock stands may vote thereon at any meeting of the corporation although he really holds the stock in trust for another person whose name does not appear, if his cestui

que trust is satisfied with his so doing ; *Wilson v. Proprietors of Central Bridge et al.*, 4-154.

24. **RIGHT TO VOTE AT.** The books and records of a corporation determine who are its stockholders, for the time being and who have a right to vote on the stock, although the same may have been sold or pledged as collateral security. The person who appears, on the books of the company, to be the owner has the right to vote all the stock which stands in his name ; *State etc. v. Ferris et al.*, 6-312.

25. **TRUSTEE'S VOTE.** Where a stockholder in a corporation holds the stock in trust for another, but such trust does not appear on the books and is not disclosed by the trustee, the votes on such stock at a meeting are valid when cast by the trustees, at least where it does not appear that such votes were not in accordance with the wishes of the cestui que trust, or that the cestui que trust was not content that the stock should stand in the name of the person voting without any trust being disclosed. *Id.*

26. **FAILURE TO HOLD MEETINGS.** The neglect of a corporation to hold meetings for a period of ten years will not operate to dissolve the corporation ; *State v. Barron et al.*, 8-391.

See DISSOLUTION ; ELECTION.

MEMBERSHIP.

1. **ADMISSION TO.** When a charter of a private corporation aggregate contains no provision regulating the admission of new members, nor any restriction upon the subject, the whole matter is within the control of the corporation ; *State of Minnesota v. Sibley et al.*, 7-624.

2. **SUIT TO ESTABLISH.** A corporator whose membership is denied, has a right to have it established, and may maintain a suit for the purpose of vindicating that right ; *Tipton Fire Co. v. Barnheisel*, 10-307.

3. — ; **HONORARY MEMBERS.** In an action to determine and adjust the property and rights of a defunct fire association, the fact that petitioners are honorary members will not affect their rights to the property. They are still members of the corporation, where it appears that five years of active service entitled the corporators to become honorary members. *Id.*

4. **PROPERTY RIGHTS.** In equity, the property of a corporation is regarded as belonging to the individual corporators, and they are entitled to have their rights protected by equitable relief. *Id.*

5. **AS TO DISQUALIFICATION OF JUDGE.** A judge is not disqualified to preside at the trial of a cause instituted by persons composing a committee of a corporate body, by reason of the fact that he is an honorary member of the corporation ; *Bowman's Case*, 8-190.

See JUROR ; JUDICIAL DISQUALIFICATION.

MINING CORPORATION.

1. **TITLE TO PROPERTY.** The legal title to the property of a mining company is vested in the corporation itself, and not in the stockholders, as such ; *Wright v. Oroville Gold etc. Mining Co.*, **3-146**.

2. —. Prior possession by the corporation of mining ground, and the entry into occupation of defendants as trustees of the corporation is sufficient proof of title to support a judgment ; *Parrott et al. v. Byers et al.*, **4-282**.

3. **AS TO PROMISSORY NOTE.** The issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining. Neither the general agent nor the president and secretary of such a company, unless authorized by the board of directors so to do, can bind the corporation by a note made in its name ; *New York Iron Mine Co. v. First Nat. Bk. of Negaunee*, **6-612**.

4. **PRESIDENT.** The president of a mining company has no authority, as such, to undertake, in the corporate name, for the re-payment of a loan obtained by the superintendent without authority ; *Union Gold Min. Co. v. Nat. Bank*, **5-176**.

5. **SUPERINTENDENT.** A superintendent of a mine, with authority to take ore therefrom and crush it for the purpose of obtaining gold, can not, upon such authority, borrow money in the name of his principal even if the money be used in carrying on the mine ; *Union Gold Mining Co. v. Nat. Bank*, **4-298**.

6. —. The superintendent of a mining corporation can not bind his company by a promissory note, he not being authorized by the company to make such ; *Carpenter v. Biggs et al.*, **5-186**.

7. —. The general superintendent of a mining corporation has no implied power to borrow money on the credit of the corporation, although such money be needed in the conduct of its business ; nor can he bind the company by executing promissory notes ; *Union Gold Mining Co. v. Nat. Bank*, **5-176**.

8. **SECRETARY.** The secretary of a mining company has no authority, *virtute officii*, to execute a promissory note for the company ; *Blood v. Marcuse*, **1-195**.

9. **ASSIGNMENT.** Such note being void, as against the company, its assignment did not operate to assign the indebtedness for which it was given ; *Carpenter v. Biggs et al.*, **5-146**.

10. **TRANSFER OF STOCK.** Except as between the parties a transfer of mining stock is not valid, in Nevada, until the same shall have been entered upon the books of the corporation, so as to show the names of the parties by and to whom transferred, the number or designation of the shares and the date of the transfer ; *State of Nev., etc., v. Pettinelli et al.*, **5-516**.

11. **STATUTE OF CALIFORNIA.** The statute, of California, as to mining corporations, provides that "each stockholder shall be, individually and personally, liable for his proportion of all the debts and liabilities of the company contracted or incurred during

the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted." The right of action against the stockholder is not contingent on a recovery against the corporation. It accrues at the same time against both the stockholder and the corporation; *Davidson v. Rankin et al.*, 1-199.

MISNOMER.

1. **MUST BE PLEADED.** A corporation defendant can not take advantage of a misnomer in arrest of judgment, but must plead it in abatement; *East Tenn. & Ga. R.R. Co. v. Evans*, 4-186.

2. —. Misnomer of a party, if not pleaded, is waived. If it be necessary to plead a judgment obtained against one wrongly named, the party intended is to be connected with it, by averment of his proper name; *Lehmann, Durr & Co. v. Warner*, 6-155.

3. —. In an action brought against a corporation, a misnomer can be taken advantage of only by plea in abatement. Where service of process is properly had upon the proper officers, or officer, of the corporation sued and the case proceeds to judgment, no plea in abatement being interposed, the judgment will bind the corporation, though it be named by some other than its true name of incorporation; *Wilson & Co. v. Baker et al.*, 6-563.

4. —. F. was a subscriber to the capital stock of the Excelsior Hay Carrier Company of Rochester, N. Y., a manufacturing corporation; his subscription was not paid. B. and W. commenced an action against the Excelsior Hay Carrier Company, the summons was served on the treasurer of said corporation, judgment taken by default, execution issued and returned unsatisfied, the name of defendant being as stated in the summons. R. and H. thereupon presented a petition, under provision of the statute of New York, relating to proceedings in equity against corporations, for the sequestration of the property of the Excelsior Hay Carrier Company of Rochester, N. Y., alleging the recovery of judgment against that corporation, the issuing and return of the execution etc. The petition was duly served on the treasurer of the company. It did not appear, but made default, and an order was made sequestering its property and appointing plaintiff as receiver. In an action to recover on the stock subscription the facts in relation to the judgment and execution were shown, on trial, and plaintiff was non suited, on the ground, among others, that the judgment was void, because of the misnomer. This was held to be error. The corporation could not assail the order collaterally and, it being concluded, so long as the order remained unreversed, third persons were concluded also, and the corporation, by not appearing and pleading the misnomer in abatement, waived any objection on that ground to the validity of the judgment (2 Rev. Stat., N. Y., 459, § 14), and the

judgment was, therefore, valid against the corporation; *Whittlesey, rec'r etc., v. Frantz, adm.*, 8-550.

5. **IMMATERIAL.** The Fall River Print Works was summoned, as trustee, in a process of foreign attachment. A claimant filed with his declaration an assignment, duly recorded, of the wages of the principal defendant, from the Robeson Print Works, and offered evidence tending to show that the trustee was as well known by the appellation as by its corporate name, and that it accepted the assignment. The trial judge, jury having been waived, ruled there was no variance between the declaration and proof and found for claimant. It was held there was no ground for exception; *Gifford v. Rockett et al.*, 7-462.

6. —. A discrepancy between the correct corporate name of the defendant corporation, as given in the original charter (Laws, 1857, Ex Sess., ch. 60), and the corporate name used in special laws of 1857, chapter 134, amendatory of the charter, held unimportant, in view of the clear intention of the legislature and of the provisions of special laws of 1868, chapter 120; *Cotton v. Miss. & Rum River Boom Co.*, 7-603.

7. **HOW PLEADED.** In an action based upon a contract, if a corporation be joined as a party plaintiff by its company name, the objection that, being a partnership merely, the persons thereby represented should be specially named as parties can not be urged after plea to the merits filed and trial had; *French et al. v. Donohue*, 9-489.

8. **WHEN IMMATERIAL.** If there is enough in the expressions used in a subscription to stock, under articles of association, or incorporation, to describe the corporation intended, it will effectuate the contract of subscription; *Oler v. Balt. & R. R.R.*, for use etc., 7-349.

9. —. Where a complaint was filed in the name of The Capitol Bank of Topeka and the certificate of incorporation offered in evidence, showed that the name selected by the corporation was The Capitol Bank, and that its stated place of business was Topeka, it was held, that the variance was immaterial; and, if amendment were necessary it would be considered made, by the appellate court; *Pape v. Capitol Bank*, 7-130.

10. —. Declaration averred the contract sued on to have been made with the Insurance Company of North America. The proof showed it was made with the "president and directors of" etc. The legal effect of the contract was alleged; *Ins. Co. v. M'Dowell et al.*, 1-438.

11. —. Where a deed is made to a corporation by a name varying from its true one, parties suing upon it may sue the company in its true name and aver in the declaration that the defendant company made the deed by the name therein mentioned; so, in such case, the corporation may sue in its true name and aver in the declaration that the defendant made the deed to it, by

the name mentioned in the deed ; *N. Wn. Distilling Co. v. Brandt*, 5-249.

12. **INDICTMENT.** An indictment charged the embezzlement of moneys of the city of San Jose, a municipal corporation etc., the true name being the mayor and common council of the city of San Jose. Variance immaterial, under a statute providing that erroneous allegations as to the persons injured or intended to be injured is immaterial if the offense charged be described with sufficient certainty, in other respects, to identify the act ; *People v. Potter*, 2-66.

13. **ARREST OF JUDGMENT.** A corporate defendant can not take advantage of a misnomer in arrest of judgment ; *E. Tenn. & Ga. R.R. Co. v. Evans*, 4-186.

14. **AMENDMENT OF JUDGMENT AS TO.** A judgment against a corporation can not be corrected, *nunc pro tunc*, by striking out the name under which the defendant was sued and served with process and substituting another name ; *Brown v. Terre Haute & Ind. R.R. Co.*, 8-270.

See CORPORATE NAME.

MOBS.

1. **LIABILITY FOR ACTS OF.** The act of the legislature of Louisiana making municipal corporations liable for injuries to property within their limits, by mobs, is a salutary act, but will be enforced only when the claim is made certain ; *Fauvia v. City of N. Orl.*, 2-374.

MONOPOLY.

1. **MONOPOLY.** To create a monopoly there must be an express provision, in the act or charter, whereby the legislature restrains itself from granting charters for rival or competing works, and it can never be presumed that the government intended to diminish its power of accomplishing the end for which it was created. The state ought never to be presumed to surrender this power, because, like the taxing power, the whole community has an interest in preserving it undiminished ; *Charles Gaines et al. v. Coates*, 5-503.

2. **PRESUMPTION AS TO EFFECT OF GENERAL LAW.** In construing a statute it is to be presumed that the legislature did not intend to grant, to the corporation, such an exemption from the operation of the general law, applicable to similar corporations, as would create an unreasonable monopoly or immunity at variance with constitutional principles, and, when such exemption is excluded, by a fair construction of the particular statute, the act shall be construed, in harmony with and subject to the general law ; *De Lancey v. Ins. Co.*, 5-520.

3. **CONTRACT NOT ENFORCEABLE.** A contract, of a railroad company, which gives to one or more persons an exclusive advantage,

or monopoly, over all other transporters in the transportation of goods, is unjust and can not be enforced at law; *Messenger v. Pa. R.R. Co.*, 5-542.

See CONSTITUTIONAL LAW.

MORTGAGE.

1. **POWER TO MAKE.** Authority in a corporation to make a mortgage need not be given by a formal vote, and may be inferred from the manner in which the business is conducted, with the knowledge and acquiescence of the corporation or its officers; *England v. Dearborn*, 10-605.

2. —. One who is owner of nearly all the stock of a corporation, is its president, treasurer and general manager, has not authority to mortgage all personal chattels for a debt of the corporation. *Id.*

3. —. Mortgage under a statute authorizing a corporation to borrow money for certain purposes, to dispose of its bonds for the sum so borrowed and to mortgage its property and franchises to secure the same, upon the concurrence of the holders of two-thirds in amount of the stock of such company, to be expressed at a meeting of stockholders, to be called by the directors, who are to give notice, etc. A resolution of the directors at a directors' meeting, authorizing and directing the execution of a mortgage for a loan, it being shown that they were the only stockholders except one, and that all the stockholders assented to the making of the mortgage, while not a literal compliance with the law, is a substantial compliance with its spirit, and the mortgage will be held valid; *Thomas v. Citizens Horse Ry. Co.*, 9-189.

4. —. In such case, whether the stockholders received such a notice of the meeting as the statute required, is a matter of no importance, if they met and acted on the question. Their action is as binding as if they had the proper notice. *Id.*

5. **A DEED OF TRUST SIMILAR TO.** A deed of trust, like a mortgage, is a mere security for the debt. When the debt is paid the mortgage is satisfied, but as long as the debt remains the mortgage exists unless actually released; *Union Mut. Ins. Co. v. White*, 10-191.

6. **ONCE A MORTGAGE ALWAYS A MORTGAGE.** It is a rule of law that a conveyance once a mortgage is always a mortgage until the debt is satisfied or extinguished, or the equity of redemption foreclosed or released. In equity the mortgage is regarded as still existing unless it is intended by both parties that it shall be released or extinguished. *Id.*

7. **LIEN FOR PURCHASE MONEY.** A mortgage or lien given for the purchase money, at the time of the purchase of loose property not merged into the principal thing, is unaffected by a prior general mortgage; *U. S. v. N. Orl. R.R.*, 3-99.

8. —. Otherwise when the property purchased is annexed

to and merged into the principal property specifically covered by the general and prior mortgage, as in the case of rails laid down. *Id.*

9. OF LAND NOT USED. A company owning land and having power to mortgage all its property, real and personal, executed a mortgage of all its estate and property, real and personal. The mortgage covered land whether it was necessary to the enjoyment of the company's franchises or not; *Robinson v. Atl. & G. W. Ry. Co.*, 4-118.

10. AFTER ACQUIRED PROPERTY. A railroad mortgage covering all after acquired property, attaches only to such interest in such after acquired property as the company acquires. If that property is already subject to mortgage or other liens, the general mortgage does not displace them; *U. S. v. N. Orl. R.R.*, 3-99.

10½. DEFECTIVE CONSOLIDATION. Where corporations created respectively by the laws of Wisconsin and Illinois consolidate, but in the contract of consolidation fail to pursue the terms of their charters, and the contract of consolidation is subsequently confirmed by an act of the legislature of the state of Illinois, the corporate existence of the corporation is thereby recognized as a body corporate of the state of Illinois. A mortgage subsequently executed in the name borne by all of the consolidated corporations, by a common board of directors, conveying the property of the corporation in the state of Illinois, is as valid as a mortgage of the Illinois corporation; *Racine & M. R.R. Co. v. Loan etc. Co.*, 1-441.

11. DEFECTIVE ORGANIZATION. A junior mortgagee can not defeat a senior mortgage by showing that the corporation, to which the senior mortgage was executed, was defectively organized, if it be a corporation de facto; *Williamson v. Kokomo B'ldg and Loan Fund Assoc.*, 9-301.

12. VOID ORGANIZATION. A corporation organized under a void law can not enforce a mortgage made by it; but, if not organized for an unlawful purpose, a receiver appointed for it can demand, in equity, an accounting for the debt, purporting to be secured by the instrument. Such accounting should be with interest after the allowance of all payments made upon the loan; *Burton, rec'r, v. Schildback et al.*, 7-566.

13. BY INSOLVENT COMPANY; VOID. In New Jersey an "act to prevent frauds by incorporated companies" makes void all sales or transfers of property by corporations after they become insolvent or suspend business, or such as are made in contemplation of insolvency; wherefore, if a corporation had suspended its ordinary business for want of funds, a mortgage executed by it was void as against creditors, and this without reference to the question whether the holders of bonds issued under the mortgage had knowledge of the insolvency, the purpose of the act being to prevent an insolvent corporation, or one contemplating insolvency,

from giving preferences to some creditors; *Wells et al. v. Rahway White Rubber Co.*, 3-592.

14. **SCHOOL FUND.** A loan of the school fund on mortgage, or other security than that named in the statute, by the corporate trustees having charge thereof, is a misapplication of the funds, for which the trustees would have been personally liable; but the mortgage or other security given for such loan, is not void, in the absence of express words of the statute; *Littlewort etc. v. Davis et al.*, 8-17.

15. **PRIORITY OF LIEN.** As between trustees for first mortgage bondholders of an insolvent corporation, whose debt, under the mortgage in process of foreclosure by them, is due and exceeds the whole value of the property of the corporation and who apply to have the property delivered to them, and the receiver of said corporation, who applies for an order for sale of the property and franchises free from the lien of incumbrances, the trustees are entitled to the possession of the property and are to be permitted to operate it, leaving the question as to the mode and manner of sale to be determined at the close of the foreclosure proceedings; *Randolph et al., trustees, v. Larned, rec'r etc., et al.*, 8-408.

16. **FORECLOSURE; JURISDICTION OF PARTIES.** A mortgage to secure a note being given upon the grantee's interest as a stockholder in the property of the company, the equity of redemption is not extinguished by proceedings to foreclose the same during the war, when such proceedings were taken within the union lines, while the defendants were absent in the confederate lines and were prohibited from entering the union lines; *Dean v. Nelson and May*, 1-66.

17. **AMENDMENT OF FORECLOSURE BILL.** The supreme court may permit a bill of foreclosure, filed to enforce void securities, to be so amended, after hearing, as to ask for an accounting of the debt; *Burton, receiver, v. Schildback et al.*, 7-566.

18. **FORECLOSURE.** A suit for the foreclosure of a mortgage, given by a corporation to a trustee, to secure a number of negotiable bonds, issued under legislative power, is for the benefit of all the bondholders, whether the bill be filed by the trustee or by the holder of some of the bonds making the trustee a defendant therein; and the holders of other bonds may come in and prove their claims before the master without making themselves parties to the suit; *Hackensack Water Co. v. De Kay et al.*, 9-558.

19. —; **SALE BY RECEIVER.** Where lands of an insolvent corporation are subject to a mortgage which is in dispute, an order may be made directing a sale free from the mortgage, leaving the validity of the mortgage to be determined when the proceeds of the sale are disposed of. But, a sale by a receiver, under an order directing a sale by public auction, without any mention of prior liens or incumbrances, will transfer the property to purchasers subject

to the lien of whatever incumbrances may be upon it, with the right of the purchaser, nevertheless, to contest the validity of apparent incumbrances, either with respect to their legal existence or the amount due on them. *Id.*

20. **INTERVENTION.** Where a corporate mortgage has been foreclosed, an individual stockholder can not interfere, by injunction, to restrain levy and sale, under the mortgage *fi. fa.*, without showing sufficient reason why the corporation itself is not the party complainant; *Henry et al. v. Elder, adm'r*, 7-19.

21. **PURCHASER.** Authorized mortgage of all the property, real and personal, of a railroad corporation including its franchise, duly recorded. Purchaser under a valid foreclosure will take the same free of all subsequent liens and incumbrances. To this end, the title relates back to the date of the record of the mortgage; *Cooper et al. v. Corbin et al.*, 9-192.

22. —. Where, at the time the taxes assessed on the capital stock of a railroad company became a lien on its property, a prior lien has been created upon the same by the execution and recording of a valid mortgage thereon the tax lien will attach only on the company's equity of redemption, and when that equity is cut off, by a foreclosure sale, the purchaser will take free from any lien for such taxes, and a court of equity will enjoin a sale of the rolling stock of such company for the payment of the taxes. *Id.*

23. **EXTENDING TIME FOR REDEMPTION.** Where the holder of a debt secured by a deed of trust verbally assured the debtor that he might have further time to pay the debt after the foreclosure, and thereby induced him to let the property be sold, when, but for such assurance, the debtor would have redeemed before the sale, held, the creditor being the purchaser at the sale, that he still held the property subject to redemption by the debtor; *Union Mut. Ins. Co. v. White*, 10-191.

24. **STATUTE OF FRAUDS.** Courts will not permit the statute of frauds to be used as an engine to facilitate the perpetration of fraud. *Id.*

25. **SUBSEQUENT AGREEMENT.** Where an agreement is entered into between the mortgagor and mortgagee, by which on certain considerations and conditions, mortgagee should extend the time of payment of the mortgage indebtedness, a failure of mortgagor to perform the new agreement on his part, will prevent his insisting that a proceeding to foreclose is prematurely brought, merely because the term of the proposed extension has not expired; *Wood et al. v. Whelen*, 6-442.

26. **PERMANENT ADDITIONS.** Additions on mortgaged premises, made by the mortgagor owner, by way of improvement of the premises and permanent in their character, are regarded as a part of the mortgaged estate and pass under foreclosure sale. Property affixed to the mortgaged estate, by the owner of the land,

during the existence of the mortgage, becomes a fixture in the general sense of that term. *Id.*

27. POSSESSION BY MORTGAGEE. A creditor of a corporation, who held its bonds as collateral security, guaranteed its performance of a contract, whereupon, the corporation contracted, with him, that he should carry on its business and apply the proceeds of the contract to the purposes of fulfilling it and in the keeping up of a current working capital and, as to any surplus, if any, to apply it to the payment of current indebtedness. The bonds held by the creditor were secured by mortgage; it was held, this did not fix the character of the creditor's possession of the corporate property as being that of mortgagee. He was in as contractor and bound to account to the company; and, the proceeds received did not apply as payment on the mortgage; but, could only be applied by way of set-off; *Beecher v. Marquette & Pac. R.R. Mill Co. et al.*, 6-655.

28. APPLICATION OF PROFITS IN HANDS OF TRUSTEE. Upon the foreclosure of a mortgage upon the works and property of a corporation, there was found in the hands of trustee, in possession under the mortgage, a sum of money, the net income of the property embraced in the mortgage. This money should go to reduce the sum of the mortgage debt; *Wood et al. v. Whelen*, 6-442.

29. CONSTRUCTION OF WORDS. Where a corporation mortgages "all the real and personal property now, or hereafter, belonging to the company," a lien will be created upon the incomes, profits, and earnings of the corporation; and, the mortgagee shall have a lien on such incomes, profits, and earnings co-extensive with its lien upon the property embraced in the deed; the right to take and apply them to the payment of the mortgage debt, so far as it is past due and unpaid; *Kelly et al. v. Trustees of Alabama & Cincinnati R.R. Co.*, 6-130.

30. WHAT IT COVERS. A corporation, for the securing of its bonds, issued in the promotion of the purposes of the company, executed a mortgage upon its real estate together with its gas works thereon, with all the appurtenances thereto belonging and now situated and being thereon, together with all machinery, tools, implements, materials, fixtures in and about the same, and in anywise appertaining; and also the gas mains, pipes, and service pipes connected with said gas works and now laid under ground in the said city, and all the gas meters now on hand and in use in connection with said pipes; — together with the office, office fixtures and furniture now in the said city and used by said company. Held, the lien of the mortgage was not, necessarily, restricted to the property in the condition it was at the time of the execution of the deed; but, any enlargement of the original works, or extension of mains in the streets or under lands not owned by the company but upon license granted for that purpose, or additional machinery supplied for and attached to the

works would be regarded as additions to and part of the property originally mortgaged and would pass with the estate upon foreclosure sale ; *Wood et al. v. Whelen*, 6-442.

31. **SALE OF REALTY AND PERSONALTY TOGETHER.** A corporate mortgage embraced and covered not only the real estate upon which the company's works were situate, but, also, the "machinery, implements, materials, and fixtures in and about the same . . . together with the office, office fixtures and furniture," and provided the personal property, so embraced, should be sold with the other property. It was held proper, in decreeing sale upon foreclosure, to decree that the property be sold as stipulated: i. e. the real estate and personal property together, inclusive of all property necessary to carry on the works mortgaged and to be sold. *Id.*

32. **USURY.** Usury in a debt secured by mortgage does not render the debt or mortgage void, and in an action of ejectment by mortgagee no inquiry into the validity of the debt is admissible. The party complaining of usury must proceed in equity by bill to redeem ; *Kelly v. Mobile Bg. & Loan Assoc.*, 6-160.

33. **DEFENSE TO ; VALIDITY.** A statute forbade a manufacturing company, organized under general law, to mortgage its property unless authorized, thereto, by vote of stockholders holding three-fifths interest after notification, according to the law, of the object of the meeting called to obtain such vote. The statute provided that, in the absence of such notice, no mortgage should have any force or effect, or pass any title or interest, in the property mortgaged. Notice was given of a meeting to authorize the issue of bonds, to the extent of \$100,000, secured by mortgage. The meeting, in fact, authorized an issue to the amount of \$150,000 ; held, that so long as neither the corporation nor the stockholders raised any objection, no other person could. An act of the legislature declaring a contract void on grounds of public policy makes the contract void to all intents ; but, if the manifest purpose of the law is to protect determinate individuals who are sui generis, in their own rights, they alone are entitled to take advantage of it ; *Beecher v. Marquette & Pac. R.R. Mill Co. et al.*, 6-655.

MORTGAGE OF CHATTELS.

1. **UNAUTHORIZED.** A resolution adopted by two of three directors of a corporation, during the absence of the third director and in the absence of any lawful notice to him of the meeting, will not authorize the execution of a mortgage, whereby the latter's property is taken from his possession ; *Doyle v. Mizner et al.*, 6-655.

MUTUAL BENEFIT ASSOCIATION ; see **INSURANCE.**

MUTUAL INSURANCE COMPANY ; see **INSURANCE.**

N.

NAME; see CORPORATE NAME; MISNOMER.

NATIONAL BANKING ACT.

1. SECTION CONSTRUED. Section 29 of the national banking act, which limits the liability of any association, person, company or corporation to a national bank that it "shall at no time exceed one-tenth part of the amount of the capital stock of such" banking association "actually paid in," is to be regarded as a direction respecting the management of the bank and not as a limitation of its powers; *Union Gold Min. Co. v. Nat. Bank*, 4-298.

2. PROVISION CONSTRUED. The provision of section 30 of the act of congress of June 3, 1864, for the formation of national banks, limiting the forfeiture, in cases of usurious contracts, to the amount of the interest, has reference only to the preceding sentence, which prescribes the rate of interest in states and territories where no rate is fixed by law. A construction of this provision, which would make it applicable to contracts made in states where the rate of interest is regulated, would bring it in conflict with such state laws, be a manifest excess of the power confided in the national legislature and, therefore, unconstitutional; *Nat. Bank v. Lamb et al.*, 4-585.

3. —; STATUTE CONSTRUED. Suits may be brought under the fifty-seventh section of the act by any association as well as against it. The omission of the word "by" in the text of the statute should be regarded as accidental only; *Kennedy v. Gibson et al.*, 1-47.

4. —. The effect of section 8, act of June 3, 1864, is to provide that a national bank, when it has come or been brought as a suitor in to a court which has jurisdiction of the suit, shall stand in court in the same position, in all respects, as regards its own rights or the rights of others against it, as to the subject matter of the suit, in which a natural person who is a suitor in such case can stand. It does not give to all the courts in the United States jurisdiction of every case to which a corporation is a party; *Manufacturers Nat. Bank v. Baack et al.*, 1-93.

5. —. The provision, of the national banking act (U. S. Rev. Stat., § 5239), that if the directors of a bank organized under the statute shall knowingly violate or permit the violation of the provisions of the act, the franchises of the association shall be forfeited, such violation, however, to be first determined by a proper federal court, in a direct action brought by the comptroller of the currency, in his own name, and, in case of such violation, making the directors participating therein liable for damages, applies only to violations of the act itself, by the assumption of powers in excess of the franchises granted or by a disregard of some prohibition of the act; *Brinkerhoff v. Bostwick, receiver*, 9-610.

NATIONAL BANKS.

1. **POWER TO CREATE.** The power to create a corporation, as an appropriate instrument for the execution of a constitutional power, does not carry with it authority to confer upon that corporation unlimited privileges or immunities from state law; but only such as are necessary to enable it to effect the legitimate national objects for which it is created; *Nat. Bank v. Lamb et al.*, 4-585.

2. **BY-LAW — LIEN UPON STOCK.** A national bank has the power, under the national currency act of congress, of 1864, chapter 106, to make by-laws providing that the shares of its capital stock shall be transferable only on its books; that no stockholder shall be allowed to sell or transfer his stock, while indebted to the bank, without the assent of its directors; and, that the stock of any shareholder shall be pledged and liable for the payment of any debt due or owing from such shareholder; *Lockwood v. Mech. Nat. Bank*, 4-140; but see *Nat. Bank v. Lanier*, 3-74.

3. **SHAREHOLDER.** It may be true that a national bank may not be bound to admit a purchaser of stock in the association to all the rights and liabilities of the prior owner, unless the transfer is made on the books of the bank, in the manner prescribed by the articles of association, or by-laws, yet where it does issue certificates of shares to a subsequent purchaser, in lieu of the certificates of the prior owner, without observing its by-laws, so far as creditors of the bank are concerned, a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the national banking law; *Laing, adm., v. Burley*, 9-107.

4. **POWERS.** National banks possess just such powers as the act incorporating them gives to them — no more; *Matthews v. Skinker*, 8-149.

5. —. National banks are formed and organized for commercial purposes. Their business is the discounting and negotiation of notes etc., the purchase and sale of bills, bullion etc., and the lending of money on personal security; they may not deal in real estate, save for necessary purposes of their business or to secure pre-existing debts. In no case can they loan money on the faith of real estate security, where the debtor was not previously indebted to them. If such security is taken it is ultra vires and void and may be pleaded, by the party defendant, against its enforcement. *Id.*

6. **TO RECEIVE AND SELL ITS OWN STOCK.** When a national bank purchases its own stock to protect itself from loss, upon its debt, it is bound to sell the stock within six months. It may sell on credit and take the purchaser's notes, with the stock sold as collateral to secure it; provided, this is done in good faith; *Union National Bank v. Hunt*, 9-528.

7. PURCHASE OF COIN. National banks are authorized to buy and sell coin. Banks holding coin in pledge may sell and assign its special property therein, and such an assignment vests the legal title in the assignee; *Merch. Nat. Bk. v. State Nat. Bk.*, **3-25**.

8. DEALING ON COMMISSION. A national bank, organized under the act of congress, June 3, 1864, known as the national currency act, has no authority to engage in the business of selling the bonds of railroad companies on commission; such business is not within the scope of its corporate powers and is, therefore, prohibited to it; *Weckler v. First Nat. Bank of Hagerstown*, **7-354**.

9. —. A national bank may be held liable to the owner of merchandise, intrusted to the bank for shipment and sale, for the proceeds, although to sell produce on commission is not within the chartered or general powers of national banks; *Nat. Bank v. Priest*, **3-252**.

10. DEALING IN BONDS. A national banking association is competent to receive on deposit United States bonds of one class, under promise to exchange them for those of another. Wherefore, under such an agreement it will not be regarded as a mere mandatory or a bailee acting without compensation, but may be held to the terms of the contract and liable to the depositor, for the value of the bonds, on its refusal to deliver them; *Leach v. Hale, rec'r*, **3-336**.

11. LOANS OR DISCOUNTS ON STOCK. National banks are expressly prohibited, by the act of June 3, 1864, from making any loan or discount on the security of shares of their own capital stock. This inhibition includes deposits made by one bank with another; *Nat. Bk. v. Lanier*, **3-74**.

12. LOAN IN EXCESS OF LIMITATION. A bank having loaned money to a debtor so that his liability became in excess of the limitation stated in section 29 of the national banking act, may, nevertheless, have its action to recover the amount; *Union Gold Min. Co. v. Nat. Bk.*, **4-298**.

13. —. Where a national bank organized, from a state bank, under the national currency act, at the time of such organization received from the state bank, among its discounted notes, one for an amount larger than it was authorized to loan to a single borrower; that is, being in excess of one-tenth of its capital paid up; such note is not, nor is any note subsequently executed in renewal thereof, to be regarded, within the meaning of section 29 of the national banking act, as given for money borrowed of the national bank; *Allen v. Nat. Bk.*, **4-45**.

14. —. It is no defense to an action brought by a national bank on a note given by way of renewal for a balance due on a previous loan, which balance had been reduced, by payments and renewals, below the maximum sum it was authorized to loan, to a single borrower, that the original loan was for a sum in excess of that which the bank, by its charter, was authorized to make. *Id.*

15. **MORTGAGE SECURITY.** National banks are authorized to receive mortgages on real estate in good faith, to secure debts previously contracted. A national bank extended the time of payment of indebtedness at a usurious rate of interest, and took notes and a mortgage executed by the debtor to a third person, who indorsed them. In such case the usury only avoided the interest, and to the extent the debt was valid, the mortgage was a bona fide security, and the bank, becoming the owner of the notes, acquired the equity in the mortgage. *Id.*

16. **LOAN ON STOCK OF CORPORATION OWNING ONLY REAL ESTATE.** The taking, by a national bank, of the stock of a corporation as collateral security for a loan of money, is not a violation of that provision of the national banking act, making it incompetent for a national bank to loan money on mortgage of real estate, although the property of such corporation consists wholly in real estate; *Baldwin et al. v. Canfield*, 7-641.

17. **MORTGAGE SECURITY.** A national bank having no power to take a deed of trust, on real estate, as security for a contemporaneous loan, an injunction will lie to prevent a sale of the property, by the bank, under the deed; *Matthews v. Skinker*, 8-149.

18. **DEALINGS ULTRA VIRES; ESTOPPEL.** The maker of a promissory note, not negotiable, discounted by a national bank, can not question the right of the bank to recover on it, on the ground that such banks have no right to deal in that kind of paper; *National Bank v. Gillilan*, 8-243.

19. **USURY.** The provisions of the United States statute of 1863, chapter 106, § 30, imposing penalties upon national banks for taking usury, supersede the state laws upon that subject; *Davis, rec'r. v. Randall*, 5-455.

20. —. The provision of the thirtieth section of the national banking act, of June 3, 1864, limiting the forfeiture, for usurious charges by national banks, to the interest carried with the evidence of debt or which was agreed to be paid thereon, applies to banks in all the states and supersedes state laws on that subject; *National Bank v. Garlinghouse et al.*, 4-38.

21. —. The laws of the states, which avoid usurious contracts, do not obstruct or impede national banks, as agents of the government, in doing any thing which the public interests require that they should do, or which they are authorized to do. They affect, simply, the private interests of the bank, wherefore they have acquired no immunity from the usury laws of the state or territory, wherein they may be located; nor is such immunity necessary. Congressional legislation, for creating national banks, is not to be so construed as to bring it into conflict with state law; *Nat. Bank v. Lamb et al.*, 4-585.

22. —. Immunity from the usury laws of the state is not conferred upon national banks by the act of June 3, 1864 (13

Stats. at L. 99). A contract for a loan, made in the state of New York, with such a bank, by which it reserves a greater rate of interest than is allowed by state statute, is void. *Id.*

23. USURY. In Ohio the discounting of a note by a national bank at a usurious rate of interest does not avoid the note in toto but only to the extent of the interest; *National Bank v. Garlinghouse et al.*, 4-38.

24. STATE STATUTE OF USURY. A statute of Ohio, of March 19, 1850, an act to restrain banks from taking usury, has no application to banking institutions existing under and exercising powers by virtue of the authority of congress. *Id.*

25. NEGLIGENCE OF DIRECTORS. In an action by stockholders to recover from directors of a national bank the sum of losses occurring by reason of the gross negligence and inattention to the duties of their trust, it is not necessary to allege, in the complaint, a direction to the receiver or a demand upon him and a refusal to direct such receiver to bring the action, or a refusal of the receiver to sue; *Brinckerhoff, etc., v. Bostwick, rec'r*, 9-610.

26. JURISDICTION OF. A national banking association can be sued only in the judicial district in which it is established; *Crocker et al. v. Nat. Bk.*, and *Baker et al. v. The same defendant*, 3-402.

27. STATE JURISDICTION OF. A national banking corporation may be sued in a state court of competent jurisdiction, in the county in which such association is located; *Cooke v. Nat. Bk.*, 4-571.

28. —. A state court has jurisdiction of an action to recover from directors of a national banking corporation, the amount of losses caused to stockholders by the gross negligence of directors; *Brinckerhoff, etc., v. Bostwick, rec'r*, 9-610.

29. SUITS AGAINST. Creditors may proceed against banks organized under the national currency act, in all suits, actions and proceedings, in any state, county or municipal court in the county or city in which such association is located, where it appears that such courts have jurisdiction, under state laws, in similar controversies; *Bk. of Bethel v. Pahquioque Bk.*, 4-241.

30. —. Creditors can not proceed directly against the stockholders. These actions can be brought only by the receiver acting under the direction of the comptroller. He represents both the government and the creditors, neither of whom are necessary parties to an action in his name; *Kennedy v. Gibson*, 1-41.

31. ATTACHMENT. Under the national banking act an attachment is prohibited and may not issue out of a state court against a national bank which is, or is about to become, insolvent; *Nat. Shoe & L. Bk. v. Mech. Nat. Bk.*, 9-638.

31½. —. The property of a national bank, organized under act of congress of June 3, 1864, attached at the suit of an individual creditor, after the bank has become insolvent, can not be sub-

jected to sale, for the payment of his demand, against the claim of a receiver, subsequently appointed; *Nat. Bk. v. Colby*, **5-82**.

32. CLAIMS AGAINST DELINQUENT. The decision of the receiver of a delinquent national bank disallowing a claim is not final. Claims presented by creditors may be proved before the receiver, or they may be put in suit, in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association; *Bk. of Bethel v. Pahquioque Bk.*, **4-241**.

33. INJUNCTION. A national banking association formed under the act of congress having no power to take a deed of trust on real estate as security for a contemporaneous loan, injunction will lie to prevent a sale of the property by the bank under the deed; *Matthews v. Skinner*, **8-149**.

34. INSOLVENCY; DISTRIBUTION OF ASSETS. Under the act of congress of June 3, 1864, to provide a national currency, establishing national banks, the assets of an insolvent bank, when reduced to money, should be divided ratably and appropriated to the payment of all legal liabilities of the association, whether these consist of debts, technically so called, or result from the nonfeasance or malfeasance of the bank in respect of its binding obligations and duties; *Turner v. Nat. Bank et al.*, **3-298**.

35. SUITS BY. Notwithstanding the appointment of a receiver, a national banking association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for the purpose of closing its business and winding up its affairs; *Bank of Bethel v. Pahquioque Bank*, **4-241**.

36. RECEIVER; ACTIONS BY. The receiver of a national bank is the agent of the government of the United States, and suits in which he is officially plaintiff should be conducted by the district attorney. But, a defendant to such an action can not be heard to make the objection that the proceeding is not being conducted by the proper law officer; *Kennedy v. Gibson et al.*, **1-47**.

37. ACTIONS AGAINST STOCKHOLDERS. The power to determine when it is necessary to proceed against stockholders to enforce their personal liability to pay the debts of the association is vested by the law in the comptroller, and his determination is conclusive. *Id.*

38. CHARACTER AND LIMIT OF LIABILITY. The liability of stockholders is several, and not joint. The limit of liability is the par of the stock held by each one. *Id.*

39. JURISDICTION. When the whole amount of the par of the stock is sought to be recovered, the action should be at law: when less is required, the proceeding may be in equity; and in such case an interlocutory decree may be entered for contribution, and the cause continued for further orders. *Id.*

40. **PARTIES.** When contribution only is sought, all the stockholders within the jurisdiction may be made parties to the suit; those beyond the jurisdiction are not indispensable parties. *Id.*

41. —. The receiver holding the assets of an insolvent national bank, is a proper party in proceedings for the adjudication of claims against the bank; *Turner v. First National Bank of Keokuk et al.*, **3**-298.

42. **ABATEMENT OF SUIT.** A suit instituted against a national bank, by a creditor to enforce the collection of a demand, is abated by a decree of United States court, forfeiting its rights and franchises and dissolving it, rendered upon an information, against the bank, filed by the comptroller of the currency; *National Bank v. Colby*, **5**-82.

43. **REMOVAL OF CAUSE.** Such an association is a citizen of the state in which it exists, and, as such citizen, it may, in a proper case, exercise the right of applying for a removal of a cause pending against it from state to federal jurisdiction; *Cooke v. Nat. Bank*, **4**-571.

44. **CRIMINAL LAW; EMBEZZLEMENT.** Since the passage of the statute of the United States making embezzlement of the funds of a national bank, by one of its officers, a misdemeanor indictable in the federal courts, an accessory to such embezzlement by an officer of such a bank can not be indicted for embezzlement, under the Massachusetts statute, even though he is not indictable in the federal courts; *Commonwealth v. Felton*, **3**-399.

See **BANK AND BANKING; BY-LAWS; CASHIER; CONSTITUTIONAL LAW; POWERS; QUO WARRANTO; TAXATION.**

NEGLIGENCE.

1. **LIABILITY FOR.** The doctrine that municipal corporations are liable for the negligent construction or repairs of streets recognized and held applicable to an action against a road supervisor for the diversion of a stream by the negligent construction of a crossing thereover; *M'Cord v. High*, **2**-244.

2. **STREETS; ACCIDENTS.** When an injury is caused in part by a defect in a street and in part by an accident, the accident forms no excuse for the negligence of the corporation, when the damage would not have been sustained but for such defect, which was the result of carelessness, and the plaintiff is guilty of no fault or negligence; *City of Lacon v. Page*, **2**-200.

3. —; **SIDEWALK.** The liability of the corporation is not changed by the fact that the defect, in consequence of which a party while driving his horses, which ran away, was injured, was in that portion of the street set apart as a sidewalk when such portion, instead of being used for foot passengers alone, was devoted to the common use of teams and foot passengers. *Id.*

4. **STREETS AND SIDEWALKS.** It is the duty of the city of New York to keep the streets and sidewalks in repair; and when an

injury arises from the neglect of the corporation to perform this duty, it is liable to the person injured; *Davenport v. Ruckman et al.*, 2-628.

5. CONTRIBUTORY NEGLIGENCE. When the party injured by a defect in a street, was partially blind, and it was urged as a defense that going upon the street with impaired vision constituted contributory negligence, which would prevent a recovery, the court properly submitted this question to the jury: "Was it so improper for her to have gone into the street unattended, in her then condition of sight, that it would be negligence on her part to do so, sufficient to prevent her from receiving compensation for an injury she might sustain from the negligence of others while passing along the street." Whether the plaintiff's sight was such that she could walk the streets with "a reasonable assurance of safety," relying upon the performance by the corporation of its duty to keep the streets in good condition, was a fair test to determine plaintiff's negligence. *Id.*

6. OWNER OF ADJACENT PROPERTY. The owner of a house, whose duty it was to keep a passage way in repair, and who allowed it to become and remain in a dangerous condition, is also liable to a person who receives an injury from such neglect. *Id.*

7. EXEMPLARY DAMAGES will not be allowed in an action against a municipal corporation for a personal injury sustained by reason of the mere negligence of the corporation to repair a defect in one of its streets, which was not in the business part of the city, and was but little used by the public; *City of Chicago v. Martin et al.*, 2-205.

8. —. It is difficult to conceive a case against a municipal corporation which would justify the allowance of exemplary damages. *Id.*

9. DISCRETION, REPAIR OF STREETS. Municipal corporations have a discretion as to the time when repairs in streets not much used by the public and not in the business part of the city, shall be made; and if a personal injury is sustained by a person, by reason of a defect in any such street, the corporation can not be held guilty of gross negligence and subjected to exemplary damages for the mere failure to make the necessary repairs. *Id.*

10. WHEN ALLOWED. The rule is, that to justify the allowance of exemplary or vindictive damages, either gross fraud, malice or oppression must appear; and in the absence of these elements, the damages can not exceed and must be strictly confined to compensation for the injury sustained. *Id.*

NET EARNINGS.

1. MEANING OF. The term "net earning," in the by-laws, means such as are applicable to dividends. They would be gross receipts less the expenses of operation, and less also interest on such indebtedness of the company as it is prudent and proper to keep in a permanent form, and less also, any floating indebtedness

which good judgment would require to be presently paid, and such annual contribution to a sinking fund for the payment of debts, as might be deemed expedient to provide; *Belfast etc. R.R. Co. v. City of Belfast*, 10-534.

NON RESIDENT CORPORATION.

1. **WHAT IS.** A corporation incorporated by and organized under a statute of another state, is a non resident entity; *Newport etc. Bridge Co. v. Woolley*, 7-184.

2. **GARNISHMENT.** Plaintiff and his debtor were, both, residents of Nebraska, by the law of which state the larger part of the fund attached was exempt from seizure. The debt was for personal services which were contracted for and performed in Nebraska, where the corporation garnished had its general office and where it was accustomed to pay its employes laboring in that state. The original notice was served on the debtor in Nebraska; the notice of garnishment was served on the corporation, as garnishee, in Iowa. The supreme court of Iowa held, (1) that the court below took jurisdiction of the person of the non resident debtor by reason of the personal service, such service having the same effect as would service by publication; (2) that the rule that the situs of a debt, considered as property, is determined by the residence of the creditor, can not be applied, in Iowa, in attachment proceedings against a non resident; (3) where a corporation — in this case a railroad company — operates a road within the state it is subject to the jurisdiction of that state; (4) non residents have a right to sue in the courts of the state, and, in the absence of fraud in bringing the party or the subject matter of the suit within the jurisdiction of the court, the garnishee can not complain that the debtor is deprived of the benefit of some law existent in the state of his residence; *Mooney v. Union Pacific Ry. Co., garnishee*, 9-317.

NOTICE.

1. **POSTING.** Required that an officer post notices, as of an election. It is not contemplated that the officer will post them with his own hands or in person; *Philips et al. v. Town of Albany et al.*, 4-220.

2. **SERVICE OF.** Notice of the acceptance of a cancellation of a contract served, upon a private corporation, by leaving the same at the company's business office with a person acting as its agent and, at the time, in charge of its business, is a good service as to the company; *Parmly v. Buckley et al.*, 9-149.

3. **WHAT IS SUFFICIENT.** Where knowledge of a fact by a corporation is necessary, the corporation is held to know concerning that fact whatever its president, directors and treasurer all know; *Factors & Traders Ins. Co. v. Marine Dry dock & Ship yard Co.*, 7-236.

4. **OF OWNERSHIP OF STOCK.** A corporation can not be held to knowledge of ownership of eighty shares of stock by the transferee of a certificate of eighty shares, which shares he has not caused to be transferred to himself, merely because he, through an agent, voted at an election, at which 12,475 shares voted in the affirmative and sixty-eight only in the negative on the pending proposition; there being such almost complete unanimity as to preclude necessity for scrutiny and especially is this so when the agent who voted was himself a stockholder by purchase of other shares from the original owner of the eighty shares so voted; *Friedlander v. Slaughter House Co.*, 7-243.

5. **OF POWERS.** Persons dealing in the negotiable securities of a corporation are chargeable with notice of the powers of such corporation to make such securities, as conferred by its charter. If the power granted, by the charter, be subject to a condition, relating either to the form in which such securities shall be made, in order to be valid, or relating to some preliminary proceeding extraneous to the acts of the corporation or its officers, securities issued, not in the prescribed form or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of bona fide holders. This rule does not apply where the right to issue such securities is, by charter, conditioned on the performance of acts by the corporation or its officers, relating to the management of the corporate affairs; *Hackensack Water Co. v. DeKay et al.*, 9-558.

6. **OF PLEDGEE.** In order to make the pledge of a certificate of shares of stock valid, as to third persons, it is not necessary to give notice of the pledge to the corporation; *Factors & T. Ins. Co. v. Marine Dry Dock etc. Co.*, 7-236.

See **ASSESSMENT**; **CHURCH ORGANIZATION**; **MEETING**.

NUISANCES.

1. **NUISANCES.** The offense of maintaining a nuisance is not complete under the laws of the state, unless maintained after notice to abate; and the city council may cause any person to be punished who maintains a nuisance in the city, in violation of their ordinances, at any stage previous to the consummation of the offense under the penal code; *Vason v. City of Augusta*, 2-136.

2. **REMOVAL OF; NOTICE.** The order of the board of health of a municipal corporation, under the general statutes of the state of Massachusetts, for the removal of a nuisance, is valid without previous notice to the parties interested and opportunity for them to appear and be heard; *City of Salem v. Eastern R.R. Co.*, 2-429.

3. —; **ORDER.** An order of a board of health to a railroad company, under the same statute, for the removal of a nuisance, reciting that the company, by filling up parts of a certain pond, without supplying culverts or other means of drainage, have

created and are maintaining a nuisance at said pond; it sufficiently informs the company of the nature and locality of the nuisance to be removed. *Id.*

4. REMOVAL OF; ORDER. The order need not prescribe the mode of removal, and if it does prescribe a mode for the removal, the owner or occupant of the property is not restricted thereto; neither is the board restricted to that mode in removing the nuisance after the owner or occupant has neglected to remove it in compliance with the order. *Id.*

5. NO AUTHORITY BY LAW. A private railroad, to mines, was declared to be a nuisance and without authority of law. A statute authorized the location, building and operation of a railroad, and the purchase of any railroad, or part thereof, built or constructed, or partly built or constructed, to the right to use the same etc. A company was organized and to it was sold the railroad, mines and their appurtenances, and the road so purchased was adopted as part of its railroad and no other act was performed by the company than to relay the track, taken up under the above mentioned decree. The road so purchased having been built without authority of law and being, therefore, a nuisance, the act of incorporation did not authorize the company to purchase it, nor was it covered by the act of incorporation; *M'Candless' Appeal*, 4-121.

6. JURISDICTION; ORDER. In an action by a city against a party alleged to have caused a nuisance, to recover money expended by the board of health for removing it, if such party had no opportunity to be heard before the board, none of its findings or adjudications preliminary to the incurring of the expenses, are conclusive upon him, and all the facts on which the recovery is sought are open to be controverted and must be established by proof; *City of Salem v. Eastern R.R. Co.*, 2-429.

7. ACTION TO ABATE. An action to recover money expended from the treasury of a city or town, by its board of health, to remove a nuisance, may be maintained in the name of such city or town; *City of Salem v. Eastern R.R. Co.*, 2-429.

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OBLIGATIONS.

1. COUNTY BONDS. The power of counties of the state of Iowa to issue bonds in payment of subscriptions for railroad stock, while such power was recognized by the settled adjudications of the highest court of the state, as settled by the supreme court of the United States, in *Gelpeke v. City of Dubuque*, is not open for re-examination; *Lee County v. Rogers*, 2-3.

2. TOWN AND CITY; APPORTIONMENT. A city was created by legislative enactment, embracing territory which formed a portion of the town. The act provided that all bonds previously issued

should be paid by the city and town, in the same proportions as if the same were not dissolved; held, that a bill will lie in equity to enforce payment by the two bodies respectively, in the proportion which the assessment rolls show the property in one bears to the property in the other; *Morgan v. Town and City of Beloit*, 2-9.

See CONTRACTS.

OFFICES AND OFFICERS.

1. NATURE OF THE TITLE OF OFFICE. Neither an office nor the prospective fees thereof are the property of the incumbent. The right to fees arises only upon a rendition of services; *Smith v. Mayor etc. of New York*, 2-624.

2. COLLECTOR OF ASSESSMENTS. A deputy collector of assessments, who has been kept out of possession of his office by another, and who has not performed its duties, can not maintain an action against the city to recover the amount of fees which accrued to the office. *Id.*

3. POWERS. The power to invest town officers, lawfully chosen at any town meeting, with any special authority which the town may lawfully confer upon them, in the exercise of their official duties, is incident to the power to choose them; *Sherman v. Torrey et al.*, 2-477.

4. —. A specification in a warrant for an annual town meeting that it is called "to elect all necessary town officers for the ensuing year, and to raise and appropriate such sums of money as may be necessary to defray town charges for the coming year, and pay any indebtedness of the town," is sufficient, under the general statute of Massachusetts (chapter 18, section 22) to authorize the town to vote at the meeting, in conformity with section 73 of the same statute, to invest the collector of taxes, then duly chosen, with all the powers which a town treasurer has when appointed collector of taxes. *Id.*

5. LIABILITY FOR SERVING TAX WARRANT. An officer who serves a warrant addressed to him by a collector of taxes, substantially in the manner prescribed by the statute of Massachusetts of 1785 (chapter 50, section 6) directing him to collect from a person named a certain sum due as his portion of a certain tax, whereof said person has neglected to make payment, and thereof is delinquent," is not liable in damages to the delinquent tax payer, on the ground that it does not appear on the face of the warrant that it was issued in the due and legal exercise of a power or jurisdiction conferred by law. *Id.*

6. POWERS, WHEN NOT DULY ELECTED. When the officers of a town organized by special charter were elected pursuant to the general statute of the state relating to the incorporation of towns and cities, at a different time and as members of a body different from that provided by the special charter, they can not exercise

the authority conferred by such charter upon the body therein provided for; *Town of Decorah v. Bulis*, 2-278.

7. JUDICIAL ACTS; DISCRETION. That an officer is clothed with a discretion as to the manner in which he discharges his duties, or as to the control of the attendant acts and circumstances necessarily arising in its course, does not give to its acts a judicial character; *M'Cord v. High*, 2-244.

8. HIGHWAY; CONSTRUCTION OF; WATER COURSE. The construction of a highway over a water course, by a road supervisor, is a ministerial act, and must be so performed that a person through whose land a stream meanders will not be injured by a diversion or diminution of the stream. *Id.*

9. PERSONAL LIABILITY FOR TORTS. When an officer, other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable, without proof of malice and intent to injure. *Id.*

10. APPOINTMENT OF POLICE OFFICERS. The vote of the selectmen of a town in Massachusetts, appointing a person "on police duty," is a sufficient appointment under the statutes; *Commonwealth v. Cushing*, 2-483.

11. QUALIFICATION. A police officer appointed by the selectmen of a town, under chapter 18 of the general statutes of Massachusetts, need not be sworn to the faithful discharge of the duties of his office. *Id.*

12. UNAUTHORIZED ORDERS. The directions of a superior officer, when unauthorized by law, do not justify a disregard of official duty; *State, ex rel., v. Magill*, 2-327.

13. UNAUTHORIZED ACTION; LIABILITY FOR. When a municipal corporation has no authority under its charter to destroy buildings to prevent the spreading of a conflagration, it is not liable for buildings destroyed by its officers for that purpose, though they assumed to act officially; *Hornblower v. Duden*, 2-86.

14. LIABILITY OF OFFICER. The agent of a town for the purchase and sale of intoxicating liquors, under the general statutes of Massachusetts (chapter 86, section 17) is not liable, under any circumstances, in damages to any person for refusing to sell intoxicating liquors; *Dwinnells v. Parsons*, 2-447.

15. LIABILITY FOR MISTAKES. Under the statutes of Massachusetts, the assessors of a town are not liable for assessing erroneously, but with integrity or fidelity, a tax on a person not an inhabitant thereof; *Durant v. Eaton et al.*, 2-445.

16. PERSONAL LIABILITY OF OFFICERS. The makers of a promissory note were described in the body thereof as "we, the trustees of School District No. 20, county of Olmstead," and appended to the individual signatures of the makers was added the word "trustees." Held, that *prima facie* the note was the indi-

vidual obligation of the makers and not of the district; *Bingham v. Stewart et al.*, 2-559.

17. **MANDAMUS.** In Massachusetts, mandamus lies to enforce the right of the member of a board to the exclusion of a person whom the other members wrongfully recognize and permit to act in his stead; *Conlin v. Aldrich et al.*, 2-461.

18. **HEALTH COMMISSIONERS.** The board of health, provided by chapter 72, Laws of New York, 1866, exercises administrative rather than judicial functions; *Metrop. Board of Health v. Heister*, 2-634.

19. **AUDITOR OF ACCOUNTS; AUTHORITY OF.** The statute creating the office of auditor of St. Louis county defined his duties to "be the general accountant of said county, and keeper of all public account books, accounts, contracts, vouchers, documents, official bonds and all papers relating to the accounts and contracts of said county and its revenue, debt and fiscal affairs not herein required to be kept by some other person." Held, that this did not confer authority upon the auditor to draw warrants upon the county treasurer: *State of Missouri, ex rel., v. St. Louis Co. Court*, 2-594.

20. **DIRECTORS OF SCHOOL DISTRICT.** While the board of directors of a school district are a corporation, under the laws of Illinois, they are the agents of the tax payers and inhabitants of the districts, and as such can do valid acts only within the scope of their authority; *Glidden v. Hopkins*, 2-172.

21. **DELEGATION OF AUTHORITY.** The members of a board of directors can not delegate their authority — the trust reposed in them being personal in its character. *Id.*

22. **POWER OF CLERK; STATUTE CONSTRUED.** The statute provides that the clerk of the circuit and county commissioners' courts shall provide books, safes and other articles for the safe-keeping of the archives of their respective offices and that "the county commissioners' court shall make allowances for the same, and for articles of stationery necessary for their respective courts out of the county treasury from time to time." Held, that if the county board of supervisors caused the clerk's offices to be furnished with the necessary stationery the clerk would not be at liberty to purchase at the expense of the county; but, if the offices are not properly furnished by the board, the clerk, in the exercise of a power incidental to the office, may make the necessary purchases and insist upon payment by the county; *McClaghry v. Supervisors*, 2-146.

23. **STATUTE OF GEORGIA CONSTRUED.** It was decided by statute that the city council of Augusta "shall be and they are hereby authorized to elect an officer to be known as 'recorder,' in whom they may vest exclusive jurisdiction of the violation of their ordinances;" that, "in the absence of the recorder, the city council or mayor may appoint one of their body to preside in the

recorder's court," and "that said recorder shall be elected, and hold his office for the term of two years, shall take an oath before the mayor, well and truly to discharge the duties of his office," etc. Held; (1) that it was the duty of the city council to elect a recorder — the word "may," when used in relation to the duties of officers, being equivalent to the word "shall;" (2) that the council had no power to remove the recorder except for cause; and, when legally removed, the mayor could not be appointed to act permanently in his place; *Vason v. City of Augusta*, 2-136.

24. **ELIGIBLE PERSON.** One who is competent to vote is a stockholder. If competent to vote he is eligible to office in the corporation; *State of Connecticut, ex rel., v. Ferris et al.*, 6-312.

25. **VOTING.** Every stockholder has the right to vote at one time the number of shares owned by him, for the whole number of directors to be elected; or he may cumulate his shares upon one candidate, or distribute them among many as he may see fit, and the corporation has no power to adopt any other mode of election; *Wright v. Cent. Cal. Water Co.*, 10-76.

26. **DEFECT OF POWER.** An individual officer of a corporation can not, by his acts, bind the corporation, unless such acts are authorized, or approved, by the corporation; *Brooklyn Gravel R. Co. v. Slaughter*, 3-292.

27. **NON EXISTENT POWER.** An officer of a corporation has no power, by virtue of his office merely, to make a sale of the property of the company; *Chi. & Northwestern Ry. Co. v. James et al.*, 4-218.

28. **ACTS OF; CORPORATE ACTS.** Acts of the officers of a company done in the line of their official duty, or under the sanction of law, are as effectually the acts of the company they are members of, as if those acts were done by authority of a vote of the directors of the corporation; *Starrett v. Rockland Fire & Mar. Ins. Co.*, 7-271.

29. **ADMINISTRATIVE ACTS.** Acts of administration in the ordinary business pursuits of a corporation can be performed by the president, or other authorized officer; but such authority must be provided for by special laws, or by stipulations in the charter, and must apply to well defined acts within the essential object, or objects, for which the corporation was created; *Bright v. Metarie Cemetery Asso.*, 7-260.

30. **ACTS OF, NOT BINDING.** Where certain officers of a corporation, having general authority to execute promissory notes for their corporation in proper cases; but, having no authority in the particular case in question, in a transaction having no connection with the corporate business and not authorized by the corporation, and without any consideration moving to the corporation; execute, in the name of the corporation, to a third person who has no actual knowledge of their want of authority, a promissory note for a claim which such third person holds against another and a

different corporation, the first mentioned corporation is not liable, on the said note, to the payee thereof, where there has been no subsequent ratification, by the corporation, of the act of its officers; *Ehrgott & Krebs v. Bridge Manuf. of Topeka*, 7-122.

31. **THEIR OBLIGATIONS.** When the people, through the legislature, grants to a company the right of eminent domain, for the purpose of constructing a railway, the grant is made because it is supposed the road will bring certain benefits to the public. When the company is incorporated and subscriptions are made to the stock, the money is subscribed upon the understanding that the officers, intrusted with the construction of the road, will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders, compatible with a proper regard for the public convenience. These, and these alone, are the considerations which should control the action of the president and directors of the road and, so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust toward the stockholders and of a breach of duty to the public at large; *Bestor et al. v. Wathen et al.*, 4-351.

32. **POWERS AND DUTIES.** The managers and officers of a corporation are, in fact if not in form, trustees for its stockholders and its creditors. As such they have no right to enter into any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice. If called upon to sell the estate of the company, it is their duty, to the utmost of their power, to secure the highest price which can be obtained for the property; *Jackson v. Ludeling*, 5-86.

33. —. If the officers of a corporation openly exercise a power, which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers shall be deemed rightful, and the delegated authority will be presumed; *Western Un. Tel. Co. v. Eyser*, 5-161.

34. **MISMANAGEMENT.** Officers and directors are mandataries of the corporation, and as such, they are liable to their principal for breaches of their duty; *Raymond v. Palmer*, 10-482.

35. **PRESUMPTION AS TO.** The presumption of authority to act, on the part of the proper officer of a corporation, will not be overcome by the mere fact that it is proved that there is no vote of the board of directors on the subject matter of the action; *Thorington v. Gould*, 6-147.

36. **PRESUMPTION AS TO.** Persons acting as officers of a corporation are presumed to be rightfully in office; *W. Un. Tel. Co. v. Eyser*, 5-161.

37. **BINDING EFFECT OF BY-LAWS.** An officer of a corporation must be presumed to know its by-laws adopted prior to his appointment, and is bound by them, as by a law between himself

and his employers, as to his tenure of office; *Hunter v. Sun Mut. Ins. Co.*, 5-403.

38. **USURPERS.** After the lawful election of other directors and their organization as a board, a note executed by the old board, still acting as such, but as usurpers, to its president and signed by him, as such, with the other officers, is unauthorized and is not the note of the corporation; *Lebanon etc. G. R. Co. v. Adair*, 9-259.

39. **ELECTION — SETTING ASIDE.** A stockholder may maintain an action to set aside an election of directors, although at the time of the election there was no stock standing in his name on the books of the company, sufficiently long to entitle him to a vote; *Wright v. Cen. Cal. Water Co.*, 10-76.

40. **ACT IN EXCESS OF AUTHORITY.** If an officer of a corporation is continuously suffered to exercise general authority, in the corporate business, the corporation may become bound by his acts, within the scope of the powers so assumed, as if the authority had been expressly granted; *Union Gold Min. Co. v. Nat. Bank*, 5-176.

41. **CORPORATE LIABILITY FOR ACTS OF.** If the officers and agents of a corporation contract with other persons, and, in their negotiations, so act as to induce such persons to believe they are acting for the corporation, and credit is given upon that belief, the corporation will be liable, although such officers or agents were not, in fact, acting for it in such negotiations; *Wilson Sewing Machine Co. v. Boyington*, 5-308.

42. **ACT IN EXCESS OF AUTHORITY.** It is well settled that where a person deals with an officer of a corporation, who assumes authority to act in the premises, and no irregularity or want of authority is brought to the knowledge of the party so dealing and nothing occurs to excite suspicion of such defect, the corporation is bound although the agent exceeded his powers; *Lungstrass v. German Ins. Co.*, 8-124.

43. **INSTANCE.** Where the agent of a fire insurance company, acting under authorization of the company's secretary, accepts a policy sent him by the company and charges himself on his agency books with the premium, the contract, between him and the corporation, is consummated although neither the premium nor a letter of acceptance is forwarded by him to his principal. *Id.*

44. **COMPANY'S LIABILITY FOR ACTS OF.** The fact that the mismanagement of a company, making its condition such as to be hazardous to parties in interest, and to the public, is attributable to one officer alone — in this case the secretary — is no defense to a proceeding to bring about its dissolution. The corporation can act only through its officers and agents and it is their management which produces the result, without regard to which one, or how many officers or agents participate in the mismanagement; *Chi. Life Ins. Co. v. Auditor etc.*, 9-79.

45. **SCOPE OF POWER.** The president of a corporation who is, also, general agent and superintendent, clothed with power necessary to carry on its business; subject to the law of the state, the corporate by-laws and the directions of the directory; has power to raise money for the company to carry on the business of the company and to pay off the debts for which it is liable; Seeley *v.* San Jose Indep. Mill & Lumber Co., 9-17.

46. **INDIVIDUAL LIABILITY FOR TORT OF SERVANT.** An officer of a private corporation is liable individually for an illegal act done by him or another servant of the corporation acting under his orders where he has authority to control the servant doing the act, and such act results in an injury to another person. The fact that the corporation will also be liable will not exonerate the officer from individual liability; Peck *v.* Cooper, 10-237.

47. —. Where the president of an omnibus line, issued an order to its drivers to exclude all colored persons from riding in their conveyances and, in pursuance of such order, a driver ejected a colored person from his omnibus and, in so doing, inflicted a personal injury, the president was held liable individually to the person so ejected for the damages so received. *Id.*

48. —; **EVIDENCE OF INTEREST OF OFFICER IN CORPORATION NOT MATERIAL.** In an action to recover damages for such injury, evidence that defendant was a large stockholder in the corporation, and as to what disposition he had made of his stock, is irrelevant and immaterial. *Id.*

49. —; **RETENTION OF OFFENDER IN SERVICE OF COMPANY MAY BE SHOWN.** In such an action the fact that the driver was retained in the service of the company after the injury, with knowledge by the officers, of his misconduct, resulting in a personal injury to another, or their failure to discharge him for negligence, is admissible in evidence as indicating the animus of those controlling the corporation, and an ingredient in the measure of damages. *Id.*

50. **PURCHASE BY, OF CORPORATE PROPERTY.** An agent of a corporation who, as an individual, purchases the property of a corporation from himself, as agent, can not uphold such purchase by proof that he agreed to pay what he thought the property was worth, but is liable to the corporation for the actual value of the property so, by him, purchased; Nat. Bk. *v.* Drake, 9-340.

51. **PERSONAL LIABILITY.** In Massachusetts, an action at law does not lie against corporate officers to enforce liability, to the extent of their stock, for debts; the remedy is in equity; M' Rae *v.* Locke et al., 5-454.

52. **MAL-FEASANCE OF.** When a corporation is empowered to borrow money for the proper use of the corporation, the mis-appropriations of money borrowed, by the officers of the company, in the absence of fraud participated in by the lender, is no defense to an action to recover the sum lent and borrowed; Thompson et al. *v.* Lambert et al., 6-523.

53. **MAL-FEASANCE OF.** While the lender may justly be required to ascertain there is a right in the company to borrow, he will not be required to follow the money he lends and see that it is applied to a corporate purpose ; and, in the absence of bad faith on the part of the lender, it is immaterial that he has knowledge of the intended purpose to which the fund borrowed is to be applied. *Id.*

54. **WRONGFUL APPROPRIATION OF MONEYS.** A bill, by a corporation, against persons who were formerly its officers, to recover moneys which the bill alleges they wrongfully and fraudulently voted to themselves severally for services and moneys, which it is alleged they wrongfully made by the use of the company's money, can not be said to be a bill which will save a multiplicity of suits. It might enable three distinct causes of action against different parties to be united, but would be as likely to create confusion as to save difficulty. Moreover, if the parties have combined in fraud, they may be united in suit at law ; *Bay City Bridge Co. v. Van Elten et al.*, 6-601.

55. **MIS-APPROPRIATION OF PROPERTY.** An action against an officer of a corporation, to recover damages for a fraudulent misappropriation and conversion, by him, of the corporate property, can only be brought by a stockholder in his own name after application to and a refusal upon the part of the corporation to bring the action ; *Greaves v. Gouge*, 8-492.

56. —. The fact that the wrongful acts of an officer of a corporation have depreciated the market value of the capital stock held by a stockholder, to an extent greater than its share of the actual loss sustained, does not authorize an action by the stockholder in his own name, without making the corporation a party to recover the difference between the actual loss and the depreciation. *Id.*

57. **WITHDRAWAL OF DEPOSITS.** The permitting of depositors to withdraw their deposits from the bank at any time before suspension of the bank, may or may not entail responsibilities on the directors, according to circumstances. Some thing more than mere knowledge of insolvency would be essential to sustain such liability ; *Raymond v. Palmer*, 10-482.

58. **ABUSE OF AUTHORITY.** Under general authority to officers of a corporation — in this case the president and cashier of a bank — giving them entire control of all financial transactions of the company, unrestricted by any by-laws or rules of the board of directors or stockholders, they have no power to use the property of the corporation in the private business, or for the individual benefit, of one of themselves ; *Rhodes, ass'te etc., v. Webb*, 7-619.

59. —. Under such general authority such officers can not bind the corporation by any contract to which they, or either of them, are parties. *Id.*

60. **INSTANCE.** W., a director of a bank, owed it \$1,000, evidenced by a note, and held \$1,000 of its stock. T., president of

the bank, made an agreement with him to purchase the stock for himself and, to carry out this agreement, the president received the stock from W., handed it to the cashier, instructing him to hold it in place of W.'s notes and to surrender the note to W., saying that he, the president, would pay the amount to the bank. The cashier received the stock, stamped the note paid and surrendered it to W. Held, that the bank, there being no ratification of the transaction, was not bound and that the transaction did not discharge W.'s liability to the bank upon the note. *Id.*

61. **SALARY.** The officers of a corporation who are to receive any compensation, are usually provided for by regular salaries. If no salary, and no particular contract for compensation is made, much must depend upon the custom with regard to their compensation, and the expectation of the parties growing out of the employment; *N. O. & B. S. Packet Co. v. Brown*, 10-707.

62. **INSTANCE.** In this case, the court finds that defendant's services were valuable to the company, and he having retained a stated sum out of the earnings of the company as his salary, with the knowledge of the other directors, refused a judgment for restitution of the same, asked for by the company. *Id.*

63. **QUÆRE.** Whether, in case the defendant has been suing the company for payment of his salary, the court would compel payment is not decided. *Id.*

64. **COMPENSATION.** A contract in regard to compensation measures both rights and obligations. The agent alone can not change it, nevertheless, the services may have been of incalculable benefit to the principal. His possession and control of the funds of his principal give him no added rights. A failure to return all funds and properties of such principal in excess of the stipulated compensation, gives to such principal a clear and undisputed right of action. This elementary rule is not changed by reason that the principal is a corporation and the agent its chief executive and managing officer; and, in such a case, a contract to act as agent gratuitously is binding; *Nat. Bank v. Drake*, 9-340.

65. —. In the absence of positive restrictions, where no salary is prescribed, one appointed to an executive office — like that of cashier — is entitled to a reasonable compensation for his services; and the directors have power to fix the salary after the expiration of the term of office; this, though such appointee is, also, a director and continues to be such while holding the independent office. *Id.*

66. —. An officer of a corporation can not recover compensation for the performance of the usual and ordinary duties of his office, unless it has been so specially agreed. In such case he can not recover on the quantum meruit; *Citizens Nat. Bk. v. Elliott*, 6-571.

67. **AGREEMENT TO PAY MADE BEFORE ORGANIZATION.** The promoters of a corporation, or members of it, can not by agree-

ment, or converse, bind the corporation they subsequently form to the payment of salaries to officers, and the fact that services are performed after organization is immaterial to change the rule of non payment for such services, save upon contract entered into by the corporation. *Id.*

68. EXTRAORDINARY SERVICES. For services such as do not pertain to the particular office one holds, compensation may be recovered, although there be no official agreement. *Id.*

69. SALARY OF. It will be presumed that the salary awarded an officer of a corporation (as the president), is provided as a compensation for services which he is expected to perform for the company. Therefore, when with the assent and co-operation of the officer, the company disposes of all its property and business, so that he has no further duty to perform or service to render as an officer, there is no basis, whether in law or in equity, for a claim that his salary shall continue. The contract, as to the salary, must be deemed dissolved by the act and consent of the parties; *Long Island Ferry Co. v. Terbell*, 4-562.

70. SALARY OF PRESIDENT. In the absence of a by-law or resolution of a corporation providing compensation for the service of its president, such compensation can not be recovered; *Merrick v. Peru Coal Co.*, 4-360.

71. COMPENSATION FOR SERVICES. To entitle a president or director of a corporation to recover for services rendered to the corporation, he must prove an express contract of employment, if the services, for which he claims compensation, are within the line and scope of his duties as president or director; *Santa Clara Mining Ass'n v. Meredith*, 7-396.

72. —. If a president or director of a corporation renders services to his corporation which are not within the scope of, or are not required of him by his duties as president or director; but, are such as are properly to be performed by an agent, broker or attorney; he may recover compensation for such services upon an implied promise. *Id.*

73. —. A president of a corporation acting upon a committee of the directory, in the prosecution of business of the directory, is not entitled to compensation for services rendered, in the absence of a contract for payment for such services; *Pew v. First Nat'l Bank of Gloucester*, 7-539.

74. —. The directors of a corporation — a bank — at a regular meeting, appointed their president and two others a committee on alteration of a building the corporation had purchased, on which expensive repairs were projected. Subsequently, at a board meeting complaint was made that no one was superintending the work. The president, after consulting with the other members of the committee and with the knowledge of the directors, but without any vote had on the subject, devoted all his time, not taken up by his duties as president of the corporation,

to superintending the work, which occupied a period of six months. Had he not done so the employment of a superintendent of the repair would have been rendered necessary. In an action by the president, based upon an implied promise of the corporation, for the value of his services as superintendent, it was held, the facts did not warrant a verdict in his favor. *Id.*

75. COMPENSATION FOR SERVICES. By formal vote, the directors of a corporation fixed the salary of their president at \$400 per annum. The president acted under this vote during four years, at the expiration of which time he demanded an increase of compensation and verbally resigned his office. A conference committee reported that he would not serve unless his salary was fixed at \$2,000 per annum. After this report was made the directors voted to fix the salary at \$400. At the next meeting of the board it was voted to approve the record of the last meeting. The president, plaintiff in action, claiming to be ignorant of these votes, came to and presided at the meeting, saying, "at your request and upon the assurance that the salary shall be arranged to my satisfaction, I withdraw my resignation." No remark was made in reply and the plaintiff, president, acted as such officer for several months when no other vote having passed on the subject matter of his salary he resigned and his resignation was accepted. He brought his action to recover for services at the rate of \$2,000 per annum. It was held, there was no contract, express or implied, to pay him as salary other than \$400. *Id.*

76. QUANTUM MERUIT. Plaintiff brings this action to recover compensation for services, which he claims to have rendered defendant (1) as its secretary, (2) as its land commissioner, (3) as its attorney and legal adviser. Defendant's charter provides that the board of directors "shall appoint a secretary and other officers and fix their compensation for the services to be rendered." Plaintiff was appointed secretary by resolution of defendant's directors, but his compensation was not fixed. Held, that plaintiff is entitled to recover the reasonable value of the services rendered by him, as secretary, as upon a quantum meruit; *Rodgers v. Hastings & D. Ry.*, 7-600.

77. VOTING SALARIES TO THEMSELVES. A vote of directors fixing the salaries of any of their number as officers of the corporation, where such vote was carried by the vote of the director whose compensation is so fixed, is *prima facie* voidable at the election of the corporation or of a stockholder; *Jones v. Morrison*, 10-657.

78. OFFICE, WHEN NOT VACATED. Non compliance with a statutory provision that officers shall be annually elected, and the failure to elect a successor to an officer at the appointed time does not, in the absence of any restrictive provision of the by-laws of the corporation, vacate the office — in this case that of president — but the officer continues to be such officer *de facto*, so far, at

least, that service of process upon him will bring the corporation in to court; *City of Fort Scott v. Schulenberg et al.*, 7-156.

79. **ATTORNEYS AT LAW.** The managing officers of a corporation have power to employ attorneys and counselors without formal resolutions, to that effect, from the board of directors. If such officers transcend their powers, as limited by the particular corporation, they are responsible to their employers; but, outsiders are not supposed to be advised of their limitations; *Western Bk. of Missouri v. Gilstrap*, 5-536.

80. **ACTING WITHOUT FORMAL APPOINTMENT.** For a period of four years, plaintiff, without any formal appointment by resolution, but with the knowledge and assent and at the request of the president and directors of defendant, acted as its land commissioner, and also as its attorney and legal adviser, and in both these capacities rendered services to defendant. Held, (1) that defendant is liable, upon an implied assumpsit, to pay the reasonable value of the services thus rendered by the plaintiff; (2) that the fact that at the time when he acted in the capacities above mentioned, plaintiff was a member of defendant's board of directors does not preclude him from recovering for his services in such capacities, the same being outside of, and beyond his duties as director; *Rodgers v. Hastings & D. Ry.*, 7-600.

81. **POWER OF DIRECTORS — TO PAY GRATUITIES.** Directors of a corporation have no power to appropriate the funds of the company to the payment of claims which the corporation is under no legal or moral obligation to pay, as for past services rendered gratuitously; *Jones v. Morrison*, 10-657.

82. **TRESPASSES.** They are likewise liable for trespasses, frauds, deceits and other wrongs they may commit against third persons; *Raymond v. Palmer*, 10-482.

82½. **WRONGFUL CONTROL.** Action will lie in favor of a stockholder, for relief against the wrongful acts of a president, when it is shown that large profits have been made by the corporation; that the president will not suffer the books of the company to show the same; that he is largely indebted to the company, for the use of its property for his individual purposes and profit; that he has received all the earnings of the company; that the other directors are stockholders only by his gift to them of stock and are under his influence and control and have yielded to him sole control of the corporate affairs. In such case an averment of demand that suit be brought by the company is not necessary; *Rogers et al. v. Lafay. Agric. Works*, 7-67.

83. **PRESIDENT AND DIRECTORS.** The president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders for and in behalf of whom they act. Persons, who become directors and managers of a corporation, place themselves in the situation of trustees, and the relation of trustees

and cestuis que trust is, thereby, created between them and the stockholders; *European & N. A. Ry. Co. v. Poor*, 4-421.

84. **DISABILITY.** Occupying a fiduciary relation toward the members of a corporation, the president and directors of a corporation can not be permitted to acquire interests adverse to such relation. *Id.*

85. **PRESIDENT.** In the absence of legislative enactment or provision made in the by-laws, corporations usually act through their president, or those representing him. He, being the legal head of the body, when an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done and is binding upon the body; *Smith v. Smith*, 4-366.

86. **PRESIDENT AS.** The president of a corporation, like any other person, may be constituted an agent for the transaction of its business, and his authority to act may be proved by the charter or by-laws, a direct vote of the corporators or board of directors, or by usage acquiesced in by the corporation; *Perry v. Simpson Waterproof Manufacturing Co.*,

87. **DOUBTFUL POWER.** Quære, whether the president of a corporation can confess judgment therefor, without authority from the directors; *Jones v. Avery*, 9-488.

88. **AUTHORITY OF THE PRESIDENT TO SELL AND ASSIGN SECURITIES.** It can not be objected by a corporation that an assignment of a note by its president was without authority, the proof showing that by a resolution of the board of directors, adopted prior to the assignment, the president was authorized to pay off any debts owing by the company, in any securities or other property of the corporation, and there being no evidence that it was assigned by him for any other purpose than that expressed in such resolution; *Mitchell v. Deeds*, 1-461.

89. **GENERAL POWERS OF PRESIDENT.** The doctrine seems to be well settled, that the president of a corporate body may perform all acts which are incidental to the execution of the trust reposed in him, such as custom or necessity has imposed upon the office, and this without express authority. And it is immaterial whether such authority exists by virtue of his office or is imposed by the course of the business of the company. *Id.*

90. **PRESUMPTION AS TO.** One who, claiming to be elected to an office as president of a corporation, fills the office, and was so accepted and received until an act of ouster, by competent authority, is such officer, and presumed to be rightfully in office; *State, ex rel., v. M'Iver et al.*, 4-160.

91. **INFERENCE OF AUTHORITY.** In the absence of both statutory authority and regulations of the corporate body, if the proof shows that the president was in the habit of exercising such power; i. e. to act as agent to transfer, or dispose of property, or nego-

tiable securities of the corporation ; then his authority to so act may be inferred ; *Mitchell v. Deeds*, **1-461**.

92. **PRESIDENT.** The president of a corporation can not put off his official character and assume the status personal at will, and deny, to those who have business with the corporation, access through him. While acting upon the business of the company, within the scope of his authority as president, all his acts must be regarded as official ; *Union Gold Min. Co. v. Nat. Bank*, **4-298**.

93. **PRESIDENT'S UNDERTAKING.** The undertaking of the president of a corporation to submit, at a specified time, a claim made to the board of directors of his company, is within the scope of his power, and it bound the company to consider the claim at the time stated. *Id.*

94. **POWER OF PRESIDENT.** The president of a corporation has authority to convene the board of directors to bring to its knowledge any matter affecting the interest of the corporation. *Id.*

95. —. The president of a corporation, merely as president, has no power to bind the corporation by any act of his aside from his official duties ; *Perry v. Simpson Waterproof Manuf. Co.*, **4-309**.

96. —. Neither the president nor cashier of a bank have the power, *virtute officii*, to sell the safe of the bank for a debt of the bank ; *Asher v. Sutton*, **10-410**.

97. —. The directors of a corporation adopted a resolution that all laborers signing a contract to remain through the season, should be paid a bonus of fifteen per cent. when the season closed. Held, that this did not restrict the power of the president or superintendent of the company to hire other persons than the class of laborers referred to in the resolution, on the same terms ; *Hardy v. Tittabawassee Boom Co.*, **10-619**.

98. —. As a general rule the president of an insurance company has power to bind the company within the scope of his authority, and any one not connected with the company will not be presumed to have notice of any by-law or rule limiting the apparent powers of such officer ; *Union Mut. Life Ins. Co. v. White*, **10-191**.

99. **INDEPENDENT RELATIONS.** In the absence of concealment, or fraud, an officer of a corporation — as its president — who is not exclusively charged with the management of its business is not bound to refrain from taking from one who is indebted both to the corporation and himself, his stock, as security or in satisfaction of the debts to him. The fiduciary relation of the person, in such case, does not require him to sacrifice his rights under contracts or appropriate payments, voluntarily made to him by his debtor, to the discharge of indebtedness of the same person to the company ; *Farm. & Merch. Bank of Lineville v. Wasson*, **6-538**.

100. **INSTANCE.** The president of a bank, not exclusively charged with its business, being surety upon the note, of one who was a stockholder, which was an indebtedness to the bank, took an assignment of the stock of the debtor to secure himself against loss. The stockholder was at the time also debtor in other transactions to the bank. The officers of the bank, other than the president, had knowledge that the debtor was in failing circumstances. There was neither fraud nor concealment. In an equitable proceeding, on the part of the bank, to secure the payment of the indebtedness to it, from the stock so assigned, it was held, by the supreme court of Iowa, the defendant president was the equitable owner of the stock and that there was nothing in the transaction to give the bank a claim to the benefit of the security. *Id.*

101. **PRESIDENT DEALING WITH COMPANY.** If the president of a corporation advance money to the company to enable it to carry on its business, he can sue it and recover the money loaned. Having the right to deal with the company, he has the power to loan it money and to look to it for payment; *Merrick v. Peru Coal Co.*, 4-360.

102. **RATIFICATION; ESTOPPEL.** A corporation will be bound by the unauthorized acts of its president if it subsequently ratifies those acts, or so conducts itself, with reference to them, as that it ought to be estopped from denying his authority; and, generally, the doctrine of estoppel will apply whenever the corporation receives and retains the benefit of the contract; *Perry v. Simpson Waterproof Manuf. Co.*, 4-309.

103. **SECRETARY OF MINING COMPANY.** The secretary of a mining company has no authority, by virtue of his office, to execute an assignment of a promissory note of the company; *Blood v. Marcuse*, 1-195.

104. **AUTHORITY TO INDORSE.** The by-laws of a corporation authorized the president to indorse promissory notes; a note was indorsed by the secretary, without the knowledge of the corporation, to a person who was at the time a director, and charged with knowledge of the provisions of the by-law. It was held, that the indorsement passed no title; *Leavitt & Hunnewell v. Connecticut Peat Co.*, 1-113.

105. **TREASURER.** The treasurer of a corporation, not being authorized so to do by the by-laws of the association, made sale of some of its property. It was proved that he was in the habit of doing such business, with the knowledge and sanction of the company, and to have been, in fact, its sole managing agent. It was held that the title passed by such sale; *Phillips v. Campbell, sheriff*, 3-622.

106. **VICE PRESIDENT.** As a general rule, in the absence of the president of a corporation, or where a vacancy occurs in the office, the vice president may act in his stead. If the person elected to the office of president refuses to act as such, the vice

president not only can act, but it becomes his duty so to act in the transaction of the business of the company. It does not matter that the act, under which the body is organized, does not enumerate a vice president as one of the officers of the company, if, after providing that there shall be a president and other officers named, it authorizes the company to create other officers and the company does create the office of vice president; *Smith v. Smith*, 4-366.

107. VICE PRESIDENT. Usually in addition to the duties imposed upon the vice president as a director, he is to preside at meetings of the board in the absence of the president; *Chicago & N. W. Ry. Co. v. James et al.*, 4-208.

108. ACTION AGAINST, HOW BROUGHT. In case of a refusal of the corporation upon request to bring an action against an officer who has mis-appropriated corporate property, a stockholder may sue for the benefit of himself and other stockholders; but, must make the corporation a party defendant, alleging in his complaint and proving the refusal; *Greaves v. Gouge*, 8-492.

109. COMPELLING SURRENDER OF BOOKS. An officer whose term of office has expired may be compelled to surrender, to his successor in office, all records, books and papers pertaining to his office; *Fasnacht v. German Ass'n*, 10-330.

110. MANDAMUS. The proper remedy in case of a refusal so to do, is by mandamus. *Id.*

111. POWERS. Officers of a corporation have no right to waive citation or confess judgment which threatens to destroy the life of the corporation; *In re Louisiana Sav. Bank*, 10-466.

See AGENCY; AMOTION; BANK AND BANKING; CASHIER; COMPENSATION; DIRECTORS; ELECTION; QUO WARRANTO; SECRETARY; TREASURER; TRUST AND TRUSTEE.

OFFICER DE FACTO.

1. DESCRIBED. An officer de facto is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law. The decisions in relation to the acts of officers de facto, are, reasonably, to be restricted to those who hold office under some degree of notoriety, or who are in the exercise of continuous official acts, or are in the possession of a place which has the character of a public office; *State, ex rel., v. Curtis*, 5-509.

2. —. Officers coming rightfully into office, who continue improperly in office are, generally, regarded as officers de facto. For the protection of the public, or individuals having rights and interests to be conserved — but, not for the protection of the person holding over — the acts of such de facto officers, within the scope of the authority of the office, are esteemed valid in all collateral proceedings; *Thorington v. Gould*, 6-147.

3. INSTANCE. If the recording clerk of a corporation has not

been sworn, he is still an officer de facto and his acts are binding on third parties ; *Simpson v. Garland*, **10**—525.

4. **LIMITATION.** There can be no officer de facto in the absence of a law creating the office ; *Town of Decorah v. Bulis*, **2**—278.

5. **ACTS BINDING.** The appointment of a de facto board of officers must have the same force and effect as if made by a lawful board, and the acceptance of an appointment by such a board is to be governed by the law and by-laws under it then in force ; *Ellis v. North Carolina Instit.*, **5**—591.

6. **NON EXISTENT.** The principle of sustaining the acts of persons as officers de facto is designed for the protection of the public and third persons who are not required, by law, to inquire as to the title of one found exercising the duties of a public office. Therefore, where persons, properly elected trustees of a corporation, transferred their stock in the corporation and during three years did not act as officials ; did not hold office as trustees under any degree of notoriety ; were not in possession of the corporate property, or pretending in any manner to control or manage the same ; and, by no act had led the public, or the plaintiff, to believe they were authorized to act for or bind the corporation, a claim that they were officers de facto could not be tolerated ; *Ore Water Ditch Co. v. Reno Water Co.*, **9**—537.

7. **INSTANCE.** During March, 1876, five persons were re-elected trustees of a corporation. One month later they, and the other stockholders, sold the entire stock of the company to an individual, one H., and delivered to him all the property — real and personal — thereof. H. remained in actual possession and continued openly to use and manage the same until 1879, when he disposed of his interest to other parties. The trustees elected in March, 1876, did not resign, but, after having settled up accounts in 1876, they made no pretense to transact any business, or to act as trustees of the corporation until June and July, 1879, when a majority of the body met and allowed an account and drew a check, looking to the payment of the amount called for. It was held that the persons claiming to be trustees at the time of the execution of this check were neither trustees de jure or de facto, and the corporation was not liable for their acts. *Id.*

8. **WHO MAY COMPLAIN.** When an officer of a private corporation continues in office beyond the time limited by the company's charter, the only parties in interest to complain are the state and the stockholders of the company ; *Thorington v. Gould*, **6**—147.

9. **TRUSTEES DE FACTO.** It is not unlawful for trustees de facto of a church to eject persons, claiming to be trustees de jure under an invalid election, who enter upon the temporalities of the church ; such inter-meddlers being neither trustees in law or in fact ; *First African Meth. Epis. Ch. v. Hillery et al.*, **6**—232.

10. **USURPATION.** Entry upon the temporalities of an ecclesiastical corporation and notice of dismissal to its pastor by persons

claiming to be trustees under an illegal election, will not constitute such persons trustees de facto. *Id.*

ORDERS.

1. **DRAWN BY SCHOOL DIRECTORS.** The statute of Illinois, providing for the management of the school funds, requires that all orders by the directors, on the treasurer, shall state the purpose for or account on which they are drawn. Held, that an order defective in this particular was void; *Glidden v. Hopkins*, 2-172.

ORDINANCES.

1. **WHEN THEY BECOME OPERATIVE.** The mayor and city council of the city of Baltimore passed an ordinance which was approved on the 25th of September, 1865, entitled "An ordinance to provide for the building of a new city hall." It provided that it should remain wholly inoperative until the ninth section should be ratified and confirmed by the general assembly of the state of Maryland. On the 29th of January, 1866, the general assembly of said state passed an act entitled "An act authorizing the mayor and city council of the city of Baltimore to build a new city hall," in which there was no reference whatever to the ordinance above mentioned, and an entire absence of any words of confirmation or ratification. At the January session of the city council, in 1867, certain persons were nominated by the mayor, and confirmed by the council, as commissioners of the city and building committee of the new city hall, as provided in said ordinance, and the appointees accepted the appointment and entered upon the discharge of their duties, the mayor acting as their president. Held, (1) that the act of the general assembly was not a ratification or confirmation of the ninth section of the ordinance, but was a grant of power to be executed by future legislation on the part of the city; (2) that the ninth section of the ordinance, not having been ratified by the general assembly, as required by the eleventh section thereof, the appointment of said commissioners by the mayor was unauthorized, and conferred upon the appointees no authority whatever; *State of Maryland etc. v. Kirkley et al.*, 2-406.

See **POWERS**, 9, 10, 38.

ORGANIZATION.

1. **DEFINITION.** The word "organize," as used in charters, ordinarily signifies the choice and qualification of all necessary officers for the transaction of the business of the corporation; *N. H. & Derby R.R. Co. v. Chapman*; *Same v. Barker*, 4-340.

2. **ESSENTIAL OF.** No corporation can exist except by force of express law; *Detroit Schuetzen Bund v. Detr. Agitations Verein*, 6-651.

3. **STATE AUTHORITY NECESSARY.** A corporation can not be con-

stituted by the agreement of parties. It can only be created by, or under, legislative enactment ; *Stowe v. Flagg et al.*, 5-292.

4. LEGISLATIVE, NOT JUDICIAL ACT. It is not matter of law ; but, is a matter of policy to determine the powers and conditions of corporate existence. The legislative judgment must be exercised as to every distinct purpose intended to be provided for ; *People, ex rel., v. Young Mens F. M. Tot. Abst. So.*, 6-626.

5. UNDER GENERAL LAW. A law providing for the incorporation of companies, societies etc., can never be extended, by construction, to cases not reasonably within the terms of the statute. *Id.*

6. EFFECTED BY CONSOLIDATION. A new corporation may be as readily created by the union of two or more corporations as by the union of individuals ; and its powers and privileges may as well be designated by reference to the charters of other companies, as by special enumeration ; *R.R. Co. v. Maine*, 6-37.

7. LIMIT OF LEGISLATIVE AUTHORITY. The legislature has no authority to compel any person or society to become incorporated without its assent. Nor can any one become a member of a private corporation without taking some steps for that purpose, or any existing corporation become merged in a new corporation, so as to relinquish its former condition, without some action fully authorizing such result ; *Mason v. Finch et al.*, 5-461.

8. UNAUTHORIZED. A statute which authorizes the formation of corporations for the purpose of constructing or owning plank etc. roads, supplemented by a statute which authorizes a corporation formed under the first to act for the purpose as well of purchasing and using a part or section of a road already built, or in process of building, as of constructing a new road, does not authorize the formation of a company for the purpose of purchasing, using, maintaining, operating and extending roads already in operation ; *State, ex rel. Collings, v. Beck et al.*, 9-227.

9. DIFFERENCE BETWEEN CHARTERED AND VOLUNTARY CORPORATIONS. There is a manifest difference, as to the effect of irregularities and omissions of the requirements of law, in the organization of corporations, between a case where a corporation is created by special charter under which there have been acts of user, and a case where individuals seek to form themselves into a corporation under the provisions of a general law authorizing incorporation. In the latter case, it is only in pursuance of the provision of the statute for such purpose that corporate existence can be acquired, and persons seeking to escape individual liability, as corporators, must show, at least, a substantial compliance with the statute ; *Bigelow v. Gregory et al.*, 5-305.

10. STOCK ESSENTIAL. In Illinois stock is a prerequisite of the existence of a manufacturing company and three stockholders are an integral part thereof. *Id.*

11. NECESSARY INCIDENTS. Where a general law providing

for the incorporation of persons (in this case, of Wisconsin) provides that such persons as, by articles of agreement in writing, shall associate according to the terms of the law, and comply with its provisions, shall become a body politic and corporate, such persons do not, by merely executing articles of association and without complying with the other provisions of the law, become a corporation, and thus escape liability, as partners, for debts created by them, in the prosecution of the business of the association. *Id.*

12. EFFECT OF. Where a corporation has gone into operation and rights have been acquired under its charter, every presumption should be made in favor of its legal existence; *Busey et al v. Hooper et al*, 4-430.

13. WITHDRAWAL OF CORPORATOR. An act of incorporation having been accepted, and the company organized provisionally under the charter, no subsequent withdrawal of any of the corporators will affect its validity. *Id.*

14. VOTE AS TO. In the absence of a call made for the payment of a sum subscribed for stock, and of any provision of the charter or by-laws of the corporation to the contrary, it would seem that each subscriber has a right to participate in the organization of the company; and, in the election of trustees, is entitled to as many votes as he has subscribed shares of stock; *Baile v. Calvert College Educational Society*, 7-379.

15. COMPLIANCE WITH STATUTE. In the creation of corporations under a general law, there must be a substantial compliance with the statute relating to incorporation, and a failure to comply with any material requirement of the law is ground for impeachment of corporate existence; *People v. Cheeseman*, 10-93.

16. —. A stricter means of compliance with statutory requirements, in the formation of a corporation, is required to avoid personal liability on the ground of having become a corporation, than where, in a case between a corporation and a stockholder, or other individual, the plea of null tiel corporation is set up to defeat a liability which the one may have contracted with the other; *Bigelow v. Gregory et al.*, 5-305.

17. PRE-REQUISITES. By the statute of Colorado the essential pre-requisites of the formation of a corporation are a certificate in form and substance as prescribed by statute; that it be signed by the corporators; that it be acknowledged by some officer competent to take acknowledgment of deeds, and that it be filed in the office of the secretary of state, and, a copy, in the office of the recorder of deeds of the county in which the principal business of the corporation is to be carried on; *Humphrey, impleaded etc., v. Mooney*, 6-292.

18. —. Where a statute requires articles of association to contain certain specified facts in relation to the incorporation and to be signed by the incorporators after a certain sum subscribed and the naming of directors, it can not be said that any of these

requirements can be dispensed with, or that the statute, in respect to them, is directory merely; *Reed v. Richmond Street Ry. Co.*, 7-49.

19. **PRE-REQUISITES.** An association of persons can not claim a corporate existence, unless they shall have fulfilled the conditions precedent prescribed by the law authorizing their incorporation; *Workingmens Accom. Bank v. Converse et al.*, 7-203.

20. —. In the state of Nebraska the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed taken together are considered in the nature of a grant from the state and constitute the charter of the company; *Abbott v. Omaha Smelting & Refining Co.*, 8-305.

21. —. A general law, providing that persons may become a body politic and corporate upon complying with the provisions of the law, required that before any such corporation should commence business, its articles should be published in a manner specified, and that a certificate of the purpose for which such corporation is formed etc. should be filed in certain public offices; held, that the performance of these acts is a pre-requisite of corporate existence; *Bigelow v. Gregory*, 5-305.

22. —. A general statute of Rhode Island prohibited any charter from taking effect until a certain fee should have been paid into the state treasury. In an action wherein the plaintiff sued as a corporation, and the defendant by plea averred that plaintiff had not made the required payment and was not for that reason legally incorporated, and it appeared that the fee was not paid until after the plea was filed; it was held, that the plaintiffs were not legally incorporated, and were not competent to sue as a corporation; *Union Horse Shoe Works v. Lewis*, 1-73.

23. **FILING EVIDENCE.** The statute of the state of Wisconsin, relating to joint stock companies, provides for the publication of the articles of association and the filing of duplicate certificates of such publication, one with the secretary of state, the other with the town, village or city clerk of the town etc. in which the company is located. It is provided that the publication and recording of the evidence thereof shall be caused, by the president and directors, before the corporation shall commence business. Held, this is not a condition precedent to corporate existence; the statute does not prohibit, under penalty, the corporation from commencing or doing business until the requirement is complied with; *Harrod v. Hamer et al.*, impleaded etc., 5-621.

24. **ACKNOWLEDGMENT.** The failure of a notary public to state that the parties acknowledging the articles of incorporation were personally known to him, is not a fatal omission; *People v. Cheeseman*, 10-93.

25. **FAILURE TO COMPLY WITH STATUTE.** A publication of the articles of incorporation, instead of publication of notice of or-

ganization, as required by the statute, is not a sufficient compliance with the statute; *Clegg, Wood & Co. v. Hamilton Co. Grange Co.*, 10-362.

26. FILING BY-LAWS ETC. The provision in the statute relating to corporations, that any company formed under the act shall file a copy of its by-laws, signed by the secretary of such company, and a list of all the stockholders therein, and the amount of the stock, in the county clerk's office of the county etc., is merely directory to the company and is not a pre-requisite for its corporation; *Rosehill & E. R. Co. v. People*, 10-276.

27. NATURE OF. Under a charter power "whenever \$100,000, or more, of the capital stock shall have been subscribed for, to choose directors and perfect the organization of said corporation," and "when so organized, to proceed to commence the construction of the company's road," it is organized when directors are elected and they, when \$100,000 have been subscribed, can legally commence building the road, without waiting for the entire capital to be paid in; *N. H. & Derby R.R. Co. v. Chapman*, 4-320.

28. NAME OF; STATUTE CONSTRUED. The articles of association of a proposed gravel road company set forth no name for the corporation. The words "Fairview Turnpike" were placed at the head of the articles. It was held, that this was not a sufficient compliance with the requirements of section 1 of the act of May 12, 1852, requiring the name assumed to be set forth; *Piper et al. v. Rhodes et al.*, 1-360.

29. MEMBERSHIP. The membership of a corporation can not be increased otherwise than by individual or, possibly, joint accessions, and in the latter event surely not without some action denoting unanimous consent; *Mason v. Fitch et al.*, 5-461.

30. — BY ACQUIESCENCE. Acquiescence in the claims of a corporation, identical in its purposes with those of an unincorporated society, in the absence of circumstances creating an estoppel, will not operate to extinguish the separate existence of the latter. Nothing short of a complete cessation of its action would tend to prove acquiescence in a corporate merger, and the acquiescence of its officers would not bind the members. *Id.*

31. NO MERGER BY. The organization, under a general law, of a corporation bearing the same name with a previously existing unincorporated society, which latter body never by any action authorized the organization of or recognized the corporation as formed in the same behalf, but which remains existent and active, has not an identity of members, and is distinct in its meetings, officers, property and other incidents, does not merge the unincorporated society. *Id.*

32. WHEN EXISTENCE COMMENCES. Under the law of 1857 (of Illinois) the signers of articles of incorporation did not become a body politic and corporate; the subsequent issue and acceptance

of license of clerk of the circuit court was necessary to complete organization; *Stowe v. Flagg et al.*, 5-292.

33. WHEN PERFECTED. In Kansas, incorporation is perfected when the certificate is filed with the secretary of state; *Hunt v. Kansas & Missouri Bridge Co.*, 5-374.

34. CONSTRUCTION OF GENERAL LAW. Section 126 of the incorporation law of Nebraska provides that previous to commencement of any business, articles of incorporation must be adopted and filed. Section 132 provides the corporation may commence business so soon as its articles are filed with the county clerk and its acts shall be valid upon filing the same with the secretary of state and publication within four months. These sections were not intended to nullify the settled rule of law in regard to the qualifications of a corporation to enable it to commence business and, therefore, do not dispense with a subscription for all the capital stock, when the charter makes such subscription a condition precedent to proceeding with the accomplishment of the main design; *Livesey v. Omaha Hotel Co.*, 8-312.

35. DRAINING ASSOCIATION; WHEN COMPLETE. A draining association, organized under the statute of the state of Indiana of June 12, 1852, is not a corporation until the articles of association have been in fact recorded in the recorder's office of the county or counties in which the contemplated work is situated; *New Eel R. Drain. Assoc. v. Durbin*, 1-353.

36. DEFECT IN PRELIMINARY. The charter of a corporation provided, of the commissioners authorized to receive subscriptions for stock: "They shall receive no subscriptions to said stock unless five per cent. thereof, in cash, shall be paid to them, at the time of subscribing; and, should they receive subscriptions to said stock without payment, they shall be personally liable to pay the same to said corporation when organized." A series of notes, given for stock, being in suit, it was held, that the fact that the commissioners did not exact the five per cent., in cash, from the subscribers, afforded no defense. The clause was not a condition precedent to the organization of the company, but a personal liability, or penalty, imposed on the commissioners should they fail to collect the per centage named. The words of the section presuppose the existence of the corporation before per centage collected; *Blair v. Rutherford*, 4-192.

37. DEFECTIVE. An abortive attempt to organize a corporation does not necessarily constitute the members of the body partners or a joint stock company. *Blanchard et al. v. Kaull et al.*, 4-289.

38. DEFECT OF; LIABILITY AS PARTNERS. A general incorporation law provided for the filing of articles of association with the clerk of the county court of the county in which the principal business office was established and with the secretary of state. Until the filing of such articles with the secretary of state there

was no incorporation authorized to transact business; and the signers of the articles were liable, for purchases made, as partners; *Garnett et al. v. Richardson et al.*, 6-208.

39. DEFECTIVE. Where an association of persons, takes steps toward the formation of a corporation under a general statute authorizing the creation of such corporation and fail to become incorporated, by reason that the requirements of the statutes are not complied with, persons who have signed the articles of association and subscribed for stock are not constituted partners who have acted for the inchoate corporation; for the reason that no such relation was contemplated by any of the parties. Mere subscribers are not partners with those who assume the risk of acting for a corporation not yet legally established; *Ward et al. v. Bingham et al.*, 7-491.

40. — ; INSTANCE. A number of persons signed articles of association, which fixed the amount of the capital stock; chose officers and issued some shares of stock, intending to form a corporation under a general incorporation law. The association failed to become incorporated, because the requirements of the statutes were not complied with. Some of the members thus associated, subscribed for stock and received certificates therefor; others did not subscribe. A. and B., two of the subscribers, who had been respectively chosen president and secretary, took possession of real estate authorized to be purchased by vote of the intending corporators and carried on the business intended to be conducted by the corporation when formed, regarding themselves as agents for the association and with the intention of turning the business over to it so soon as it should become a legally established corporation. They borrowed money on their own notes and put it into the business, with the knowledge of the other subscribers and bought merchandise from the other subscribers, as well as from persons who had not subscribed. On a bill in equity, by A. and B., against all the other subscribers, as partners, for the settlement of the alleged partnership affairs, it was held that neither the defendants who had subscribed to the stock of the proposed corporation nor those who had not subscribed, were partners with A. and B. *Id.*

41. ABORTIVE ATTEMPT AT. Where there is a failure, in some essential requirement, properly to become incorporated, the members of the association are to be treated as partners; *Ferris v. Thaw et al.*, 8-265.

42. INSTANCE. Members of a masonic lodge, who had made an abortive attempt to become incorporated, were held liable on a promissory note executed by the officers of the lodge, for the purposes of the lodge, with the approval of its members. *Id.*

43. —. There being an abortive attempt to incorporate the managing members became personally bound for and did pay the debts incurred in behalf of the associated members. The associ-

ates of such managing members were bound to share the loss with them, each in proportion to the amount of stock subscribed by him and the fact that any subscriber had paid his subscription in full, or under a mistaken view of his liability had paid the double liability to which stockholders in corporations were formerly subjected, did not exempt him from liability for further contribution; nevertheless, on an accounting each should be entitled to the benefit of payments made; *Richardson v. Pitts et al.*, 8-275.

44. DEFECTS OF COMPLIANCE WITH GENERAL LAW. A statutory requirement that articles of incorporation be filed in the office of the secretary of state and that the incorporators acknowledge their signatures thereto, before an officer authorized to take the acknowledgment of deeds, as conditions precedent to lawful incorporation, is imposed by the state according to its own policy and for the protection of persons dealing with the corporation. The state may waive the conditions; *Cent. Agric. & Mech. Ass'n v. Ala. Gold L. Ins. Co.*, 9-8.

45. WAIVER OF CONDITIONS PRECEDENT. The state waives conditions precedent to lawful incorporation by enacting a subsequent statute declaring the existence of the association as a corporation, approving and ratifying its organization and amendatory of its charter. *Id.*

46. —. One Rhodes constructed a private railroad, to his mines, on the line of an incorporated company, under a contract with such company, which he was enjoined from using, being also ordered to remove the rails etc., the road being declared to be without authority of law and a nuisance. He and six others became incorporated as a railroad, coal and ore company, with a capital of \$100,000. The act authorized the location, building and operation of a railroad, and the purchase of any railroad or part thereof, built or constructed, or partly built or constructed, with the right to use the same, and damages (not settled by agreement) for land taken, occasioned by building and constructing said railroad or any partly built road purchased, were to be ascertained and paid under the general acts in relation to the acquirement of property by the exercise of the right of eminent domain. This company was organized before any stock was subscribed for and to it. Rhodes sold his railroad and mines and their appurtenances, and other property, for \$100,000, payable in the stock of the company, at its par value, the same being all its stock authorized to be issued. The company adopted as a part of its railroad the line of road purchased, as stated, deferred all further action, and did no other act than to relay a small portion of track, which had been taken up under former decree of the court and operate the road. It was held: (a) that Rhodes owning all the stock of the company, whereby he was in complete control, the road still remained a private road, after as before the

organization of the company; (b) the road, sold by Rhodes, having been built without authority of law and being, therefore, a nuisance, the act of incorporation did not authorize the company to purchase it, nor was it covered by the act of incorporation; (c) the road being wholly built before the pretended purchase, it did not come within the designation of a partly built road; (d) as the general railway act, in relation to acquiring property by the exercise of the right of eminent domain, did not apply to such a road, there was no provision for ascertaining damages for private land taken in this case, the act of incorporation failing to cure the defect; *M'Candless' App.*, 4-121.

47. DEFECT IN CERTIFICATE. A literal compliance with a statute regulating the formation of railroad corporations is not required; all that is necessary is a substantial compliance with such statute. Thus, where the only defect in the papers, necessarily prepared, to constitute such a corporation, was the omission of the words "in good faith," from the annexed affidavit, required by statute, as to the payment of the required per centage on stock subscriptions, the certificate stating that the amount had been "in good faith" paid in, it was held there was a substantial and sufficient compliance with the law; *People etc. v. Stockton etc. R.R. Co.*, 5-142.

48. TECHNICALLY DEFECTIVE. An association having complied with the provisions of law regulating its organization and incorporation, except as to the publication of the articles of association and filing certificates thereof, is, yet, a corporation, wherefore, the shareholders are not liable, jointly and severally, for its debts, as partners or associates in an unincorporated joint stock company. Creditors and others must deal with the company as a corporation, and enforce claims and demands as in case of other like corporate bodies; *Harrod v. Hamer et al.*, 5-621.

49. DEBTS CONTRACTED PRIOR TO FINAL ORGANIZATION. The statute of California provides "until final organization of the company . . . the members thereof shall be jointly and severally liable for all debts contracted prior to such final organization." In an action to recover from the members of a company under this clause, the complaint must allege that the defendants commenced the formation of such company and that before the final organization thereof debts were contracted which still remain unpaid etc.; *Blanchard et al. v. Kaull et al.*, 4-289.

50. ACTS BEYOND THE STATE. Where a number of individuals associate themselves together, for the purpose of manufacturing, and organize themselves as a corporation, in accordance with the terms prescribed by the statute of a state, and establish a place of business in the state, they thereby become a legal incorporation within that state, notwithstanding it was the undeveloped intention of the members, at the time of organization, to carry on their manufacturing operations exclusively within another state; so,

although in fact they had, since the organization, carried on their corporate works in such other state ; *State, ex rel., v. Taylor et al.*, **5-599**.

51. **ACTS BEYOND THE STATE.** By the general incorporation law of Colorado a corporation is not invalid by reason that its corporators and officers are non residents of the state ; that the subscribing to and acknowledgment of the articles of incorporation were performed outside the state and that meetings of the corporate officers were held at a place not within the state ; *Humphreys, impl., v. Mooney*, **6-292**.

52. **FRAUD IN.** If a new corporation be organized by parties interested in an old one, for the purpose of getting rid of the liabilities and fastening them on the new company and the latter, by arrangement with the creditors of the older organization, at trustee's sale, bids off the property of the old corporation for the amount of its liabilities and gives notes to such creditors, secured by deed of trust on the property thus acquired, the fraud, if any, on the part of the representatives of the old company can not affect the creditors. The existence of such state of facts will constitute no defense to a suit to compel the subscribers to stock in the new company, to pay unpaid balances of their subscriptions, to satisfy the liabilities of the new company thus assumed ; *Jewell et al. v. Rock R. Paper Co. et al.*, **9-71**.

53. **ILLEGAL INTENT.** An illegal intention upon the part of original corporators, as to its purposes, does not invalidate the corporation from its inception or dissolve it after its formation ; *Importing etc. Co. of Ga. v. Locke et al.*, **5-135**.

54. **ILLEGAL.** A society of persons associated together to resist the enforcement of state laws can not be incorporated : *Detroit Schuetzen Bund v. Detroit Agitations Verein*, **6-651**.

55. **DE FACTO.** A de facto organization of a corporation formed and operated in good faith, under color of a charter, is an organization, under the charter, within the meaning of the statute of New Hampshire (Laws of 1846, chapter 321, § 7), although it be not precisely regular, where the question arises collaterally ; *Ossipee Hosiery and Woolen Manuf. Co. v. Canney*, **5-532**.

56. —. A statute which provides for the filing of the articles of association of a corporation in the offices of the secretary of state and the county clerk, before it shall commence business, but does not attach a penalty to its violation, nor declare the act done void, is a simple inhibition, and none other than the state can complain. Any contract made by the corporation before such compliance, as by not filing the articles with the county clerk, will be valid ; *Whitney v. Wyman*, **6-77**.

57. **ESTOPPEL.** A person who contracts with a de facto corporation, as a corporation, can not in an action against him for the contract, impeach the legality of its organization ; *Butchers & Drovers Bank v. M'Donald, exec'r*, **7-535**.

58. **ESTOPPEL.** One who contracts with an acting corporation can not defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization; *Chubb v. Upton*, 6-23; *Marion Savings Bank v. Dunkin*, 6-113.

59. **ASSIGNEE IN BANKRUPTCY.** An assignee appointed under the bankrupt laws of the United States, represents both the corporation and its creditors. The defense of irregular organization can not be urged against him; *Chubb v. Upton*, 6-23.

60. **CURING DEFECTS.** A special statute, supplying and curing defects in the organization of a corporation under a general incorporation law, such corporation existing *de facto* under color of right, is not obnoxious to a constitutional provision that corporations may not be created by special act; *Centr. Agric. etc. Ass'n v. Ala. Gold L. Ins. Co.*, 9-8.

61. **LEGALITY OF, NOT ATTACKED COLLATERALLY.** The legality of the organization of a corporation can be attacked and judicially examined only in a direct proceeding by *quo warranto*. It can not be inquired into in a collateral proceeding, such as a suit by the corporation; *Osborne v. People, ex rel.*, 9-153.

62. **HOW ATTACKED.** By code of Mississippi (Revised Code, § 683) there can be no attack upon the character in which a corporate plaintiff sues, raising the question of due organization, save only by a plea under oath denying the character assumed; *Selma, Marion & Memphis R.R. Co. v. Anderson*, 8-27.

63. **WHEN TO PROVE INCORPORATION.** Where the action is to compel payment for stock of a corporation, the existence of the corporation and its capacity to lawfully issue stock, are necessary conditions precedent to the right to sue upon the subscription; *Hudson v. Green Hill Seminary Corporation*, 10-259.

64. —. There are certain cases in which it is necessary to give strict proof of incorporation; first, actions by the state to ascertain or to put an end to corporate existence; second, proceedings by a private corporation in the exercise of a franchise in derogation of a common right; third, proceedings of penal character by private corporation; fourth, actions of contracts on subscriptions for stock; fifth, where the question is whether there is corporate power to take by will. *Id.*

65. **EVIDENCE; LOST CERTIFICATE.** Where the certificate of intention to incorporate a company, as well as the records thereof, have been destroyed, parol evidence may be resorted to to prove its contents, and it is not necessary that the testimony should be so full as to the substantial statement of the certificate contained in the statement required by the statute; *Rosehill & Evanston R. Co. v. People*, 10-276.

66. —; **PRESUMPTION.** The fact shown that the certificate was drawn up by an attorney, who would be likely to make it conform to the statute, and the long time of the acquiescence in the use of the road as a toll road by the company, aid in the presumption

which may be made at this distance of time and supply the deficiency which appears in the proof of the contents of the certificate, as if it thereby be reproduced, but it will be sufficient if it shows the certificate, and that the company was duly incorporated. *Id.*

67. **QUO WARRANTO; DEFECTS.** An information, in the nature of a quo warranto, against a gravel road company, which it had been attempted to organize under the act of the legislature of the state of Indiana of 1852, as amended in 1859, alleged that the pretended articles of association did not set forth the name of the assumed company, or contain an intelligible description of the line of the route, and the place from and to which it was proposed to construct the road, or the amount of the capital stock of the company, or the number of shares into which it was divided, or the names and places of residence of the subscribers, and the amount of stock subscribed by each. On demurrer, it was held sufficient; *State, ex rel. O'Brien, v. B. & Z. Gravel R. Co.*, 1-375.

See **ARTICLES OF ASSOCIATION; ASSESSMENT OF STOCK; CORPORATE EXISTENCE; CORPORATION DE FACTO; ESTOPPEL.**

P.

PARTIES TO ACTION.

1. **STOCKHOLDERS.** Stockholders, in the absence of statutory authority, are not allowed to plead for the corporation, when the suit is against the corporation and they are not parties to the record; *Blackman v. Centr. Railroad and Banking Co.*, 7-9.

2. **BENEFICIAL OWNER.** Where the cause of action, as stated in the complaint, relates to property and property rights belonging to a corporation, as the absolute owner vested with the legal title, such corporation is the real party in interest to prosecute the action. It is no defense to such an action that another party has become the owner "of the sole beneficial interest in the rights, property and immunities" of the corporation; and, an averment of that character in the answer may properly be stricken out on motion, as immaterial and irrelevant; *Winona & St. P. R.R. Co. v. St. Paul & S. C. R.R. Co.*, 7-609.

3. **PARTIES PLAINTIFF.** Where stockholders sue the corporation of which they are members, it is usual they sue for themselves and all others similarly situated. That all stockholders are made parties plaintiff or defendant is sufficient compliance with the rule; *Rogers et al. v. Lafayette Agric. Works et al.*, 7-67.

4. **IN BILL FOR DISCOVERY.** On a bill against a corporation and certain of its stockholders to discover assets, if it appear in the bill that certain of the stockholders are unknown to the complainant, and that their names are concealed from him, the bill is not

obnoxious to a general demurrer for want of such parties; *Brewer v. Mich. Salt Assoc.*, **10-653**.

5. **IN BILL FOR DISCOVERY.** Where stockholders are out of the jurisdiction of the court, and the fact appears upon the face of the bill, a decree may be made against those over whom the court acquires jurisdiction. *Id.*

6. **SUIT BY CORPORATION AFTER DISSOLUTION.** As corporate bodies can, during their existence, act judicially in the corporate name, so, when they have ceased to exist, the parties intrusted with the winding up of their business can sue in their official capacities, without using their individual names; *President etc. v. Lord*, **10-491**.

See ACTION, PARTIES TO.

PARTITION.

1. **DECREE.** A decree in partition operates only upon the title held at the time suit was instituted, and does not estop a party from asserting after acquired title; *Elston v. Piggott*, **10-313**.

2. —. It is not incumbent upon a plaintiff in partition to make an issue settling all questions of title or rights of lien holders, although it is proper for him to do so. If parties desire to settle all questions of title in the partition suit, they must tender proper issues. *Id.*

PARTNERSHIP.

1. **OF CORPORATION AND INDIVIDUAL.** Where an association, or corporation, and an individual have assumed to enter into a partnership and jointly transacted business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name, irrespective of their partnership rights and duties as between themselves or the power of such corporation, or association, to execute the powers incident to a partnership; *French et al. v. Donohue*, **9-489**.

2. **DEFECTIVE ORGANIZATION.** An abortive attempt to organize a corporation does not, ex necessitate, constitute the members partners, or a joint stock corporation; *Blanchard et al. v. Kaull et al.*, **4-289**.

3. —. A general statute for incorporation provided for the filing of articles of association with the clerk of the county court, of the county in which the principal business office was established and with the secretary of state until the filing of such articles, as prescribed, there was no incorporation authorized to transact business and the signers were liable for purchases made, as partners; *Garnett et al. v. Richardson et al.*, **6-208**.

4. —. Where there is a failure, in some essential requirement, properly to become incorporated, the members of the association are to be treated as partners; *Ferris v. Thaw et al.*, **8-265**.

5. **DEFECTIVE ORGANIZATION.** There being an abortive attempt to incorporate, the managing members became personally bound for the debts incurred in behalf of the associated members; *Richardson v. Pitts et al.*, 8-275.

6. —. Where an association of persons take steps toward the formation of a corporation, under a general statute authorizing the creation of such corporation, and fail to become incorporated, by reason that the requirements of the statute are not complied with, persons who have signed the articles of association and subscribed for stock are not constituted partners who have acted for the inchoate corporation. Mere subscribers are not partners with those who assume the risk of acting for a corporation not yet lawfully established; *Ward et al. v. Bingham et al.*, 7-491.

6½. **TECHNICALLY DEFECTIVE.** An association having complied with the provisions of law regulating its organization and incorporation, except as to the publication of the articles of association and filing certificates thereof, is, yet, a corporation, wherefore, the shareholders are not liable, jointly and severally, for its debts, as partners or associates in an unincorporated joint stock company. Creditors and others must deal with the company as a corporation, and enforce claims and demands as in case of other like corporate bodies; *Harrod v. Hamer et al.*, etc., 5-621.

7. **UNCONSTITUTIONAL ORGANIZATION.** Where parties accept and adopt a charter which is repugnant to the constitution and subscribe to the articles of association, by which articles they agree to become liable, under the charter which provides for a liability, as individuals, to the creditors of the company, each person, so subscribing, assents to an agreement that he will be so liable as a partner, and the creditor may enforce such liability in his own name; *McCarty v. Lavasche*, 6-419.

8. **EFFECT OF CHARTER PROVISION.** The effect of a provision in the charter of a corporation, making its stockholders liable to the creditors of the corporation — in this case a bank — on its default, to an amount equal to the amount of stock held by them is to leave them liable, to that extent, as partners; *Buchanan v. Meisser*, 9-209.

9. —. A charter provided "that until \$30,000 of the stock shall have been paid in, every stockholder of said company shall be held individually liable for the debts of the company." Under this provision the stockholders are jointly and severally liable, until the payment of the sum stated, for all debts of the company. They are to be held as having contracted their obligations as partners, not as guarantors. Where a creditor is, himself, a stockholder, he must seek his remedy in equity; *Perkins v. Sanders et al.*, 8-53.

10. **STOCK OWNED BY PARTNERS.** Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against him, individually, as a stockholder, on motion of

a creditor of the corporation, in all cases where the firm would be subject to such liability; *Bray's adm'r v. Seligman's adm'r*, 9-507.

11. PAYMENT OF DEBT TO FIRM. A payment of a sum equal to the amount of his stock, to a firm of which a stockholder is a member, in satisfaction of a debt due from the corporation to his firm, will not release a stockholder from his liability to the company, or bar a suit by another creditor, inasmuch as the firm could not maintain an action at law against him; *Buchanan v. Meisser*, 9-209.

12. —. A stockholder of a corporation who pays the amount of his individual liability to a firm of which he is a member, in payment of a debt due such firm from the corporation, thereby acquires an equitable right against his co-stockholders, recognizable and enforceable, only, in equity. *Id.*

12½. WRONGFULLY ASSUMING CORPORATE RIGHTS. While persons assuming to act in a corporate capacity are liable as partners to those with whom they contract, to charge any one of them as such it must be shown that he was acting in that capacity at the time the contract sued upon was made, or that, upon some consideration, he agreed to become liable; *Fuller v. Rowe*, impleaded etc., 4-615.

13. REAL ESTATE OF. Real property of a partnership is to be treated in equity like personal funds and distributed accordingly. If the title stands in the name of one, he is a trustee and will be made to account to the others, according to their several interests, and such trustee may be compelled to convey to each partner his proportionate interest; *Faulds v. Yates*, 3-289, note 3.

14. FALSE REPRESENTATION AS TO COST. Where the purchasing partner represented to the others the purchase price agreed on greater than was in fact paid, and they agreed to pay and did pay their proportions according to the false representation, yet, upon seeking to compel a conveyance, in equity, the partners so contributing more than their proper share would not be entitled to be reimbursed for that excess. Where a conveyance of land is asked it must be granted upon the specific terms of the agreement. *Id.*

15. TO ESTABLISH LIABILITY. To establish a liability against a party, as a partner, for the acts of others it must be made to appear that a co-partnership was formed by express agreement, or that there was an authorization in advance and a consent to be bound, by such acts, as a partner, or a ratification of the acts after performance with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created; *Central City Sav. Bk. v. Walker et al.*, 8-464.

16. ACTION BETWEEN PARTNERS. A partnership firm, as a creditor of a corporation, can not maintain an action at law against a member of such firm to enforce his individual liability,

as a stockholder to the creditors of the corporation ; for the reason that he can not be both plaintiff and defendant ; *Buchanan v. Meisser*, **9**-209.

17. EVIDENCE ; ADMISSION. Where the fact of a partnership, between defendants, is in issue, the admission of the fact by one of them is proper evidence against himself ; *Sullivan et al. v. Murphy et al.*, **7**-606.

PENALTY.

1. LIABILITY IN A NATURE OF A PENALTY. A statute which provides that an officer of a corporation who shall intentionally neglect, or refuse, to comply with provisions of the act, shall be liable for all debts of the corporation contracted during the period of the neglect or refusal is a penal statute. The liability thus imposed is in the nature of a penalty for the violation of law and is not a debt. Such a liability does not survive the death of the officer who has become liable ; *Mitchell et al. v. Hotchkiss*, **6**-329.

2. RECOVERY OF. Where it is sought to enforce the payment of penalties imposed by charter, upon a corporation, in favor of stockholders and which do not form assets of the corporation, the individual creditor must proceed at law upon his own behalf ; *Lane et al. v. Nickerson et al.*, **6**-513.

See PERSONAL LIABILITY.

PERSONAL LIABILITY.

1. AT COMMON LAW. By the common law a personal liability did not exist on the part of a stockholder of a corporation ; *Chase v. Lord et al., exec'rs*, **8**-575.

2. —. By the common law, a stockholder of a corporation is not liable for its debts. He is liable to an action at law, by the corporation, for unpaid stock subscribed ; but, no creditor could sue him, at law, for the amount so unpaid. Creditors may, however, by bill in equity, compel delinquent stockholders to pay stock subscriptions due from them ; *Jones et al. v. Jarman*, **6**-198.

3. CONSTITUTIONAL LIABILITY. A state constitution provided that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law ; but, in all cases, each stockholder shall be liable over and above the stock by him, or her, owned, and any amount unpaid thereon, to a further sum, at least, equal in amount to such stock." The legislature failed to provide any specific form of remedy in a general law in regard to corporations ; but, simply re-enacted in substance, the constitutional clause. The clause of the constitution was self executing to the extent of the minimum liability prescribed by it and it entered into and formed part of the act under which any corporation was organized in pursuance thereof. Wherefore, though the act failed to prescribe the remedies for creditors

the stockholders' liability might be enforced by proper judicial tribunal. *Id.*

4. NATURE OF LIABILITY. The liability of a stockholder, upon his capital stock subscribed for, is several and not joint; *Hatch v. Dana*, 6-63.

5. —. Where a statute, relating to a corporation, declares that it shall not transact business until certain preliminary things have been done and if it does so transact business, in violation of such provision, the trustees and corporators shall be liable to the creditors to a given amount, the liability so imposed is a penalty for violating the law, or allowing it to be done. On the other hand, where the statute declares the corporation may transact business and the stockholders shall be liable for its debts contracted either absolutely or until some subsequent thing shall be done, their liability is primary and is based upon a contract. In the first case it is based upon a tort; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

6. NATURE OF, UNDER AN ACT STATED. Under a general — insurance — law of Illinois (of 1869), a corporation has no authority to commence business and issue policies until after the auditor of public accounts shall have delivered to it a certified copy of its charter and of certain certificates required to be filed with such auditor and the company shall have filed them in the office of the proper county clerk for record. Any attempt on the part of the corporation so to do before this is done is in direct violation of the statute. The individual liability of a stockholder, imposed by such act, is a penalty prescribed for transacting business before requirements complied with and is in the nature of a punishment for the violation of the provisions of the act. The act creates no primary liability, by way of contract, between the stockholders and creditors of the corporation, for the debts thereof and, hence, the right of action given does not survive the death of the stockholder. *Id.*

7. —. Although a corporation is prohibited from commencing business before certain things are done, which are essential to constitute a license or authority, if, in defiance of such prohibition, it should commence business, as between it and the other contracting party, who has performed his part of the contract and paid his money, the company will be estopped to deny its authority to make the contract and it will be liable, in an action thereon at the suit of the creditor; but, such debts are not made, by the statute, the debts or liabilities of the trustees or corporators. The latter are not made liable jointly and severally with the company. Their liability to the creditors is not for their indebtedness, but for that of the company, as a penalty for allowing it to do business in violation of law. *Id.*

8. —. In such case the individual liability of the trustees or corporators, to creditors of the corporation, when such company

has not complied with the law, does not depend upon the fact the creditor has sustained any actual loss or injury by the failure of the trustees or corporators. The creditor is only required to show the company owes him, and that the whole amount of the capital of the company has not been paid in, and a certificate thereof recorded, as provided by the act. *Id.*

9. CONSTITUTIONAL PROVISION CONSTRUED. The constitution of the state of Missouri (art. 8, sec. 6, 1865 as amended in 1870) provides that "dues from private corporations shall be secured by such means as shall be provided by law; but in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him, or her. Under this provision a stockholder is not liable for a debt of the corporation, if he shall have paid the whole amount of the stock subscribed for or owned by him; *Schriker et al. v. Ridings*, 8-166; *Gansen v. Buch et al.* (note), 8-166.

10. EFFECT OF CHARTER PROVISION. The effect of a provision, in the charter of a corporation, making its stockholders liable to the creditors of the corporation — in this case a bank — on its default, to an amount equal to the amount of stock held by them, is to withdraw from the stockholders, to the amount of their stock, the protection of the corporation, and leave them liable to that extent as partners; *Buchanan v. Meisser*, 9-209.

11. CONSTRUCTION OF STATUTE IMPOSING. A statute which imposes upon the stockholders of a corporation a personal liability for corporate debts must be construed strictly. It is in derogation of the common law and can not be extended beyond its literal terms; *Chase v. Lord et al., exec'rs*, 8-575.

12. —. A statute, authorizing the incorporation of persons, provided "the trustees and corporators of any company organized under this act and those entitled to a participation of the profits shall be, jointly and severally, liable until the whole amount of the capital raised by the company shall have been paid in, and a certificate thereof recorded, as herein before provided" (Laws, N. Y., 1849, ch. 308, § 19). It is not necessary that the whole amount of the capital of the company shall be paid in and a certificate to that effect filed in order to relieve a corporator from liability. *Id.*

13. —. The certificate referred to is that required by a preceding section (§ 11) of the act; that is, a certificate of the comptroller, or examiners appointed by him, that, an amount specified as a pre-requisite of doing business, has been paid in. *Id.*

14. —. The act provided for the filing of a certificate that a certain amount of capital stock, or securities specified, has been paid in before the corporation might commence business. The object of the provision is to provide a preliminary fund to meet losses occurring before there are sufficient accumulations of funds from other sources — in this case insurance premiums — to meet

them. By a later section an examination is required and a certificate that such capital has been paid in. Such certificate being made and properly filed the company is authorized to commence business; and, thereafter, the corporators are released from personal liability. *Id.*

15. CONSTRUCTION OF STATUTE IMPOSING. Under the act above quoted, the word "corporators" does not include stockholders. Corporators are associates engaged in organizing the company, whose functions cease upon organization effected; stockholders then come in and after their functions cease they can not further be held liable for corporate acts. *Id.*

16. —. Under the act above quoted, and which adopts so much of the corporation act of the revised statutes, the remedy of the creditor of a corporation organized under the former is by proceeding under the liability clause of the latter; which imposes upon each stockholder the obligation to pay on each share of his stock, the sum necessary to make it full paid, or such proportion thereof as shall be required to pay the corporate debts. *Id.*

17. —. Where a statute provided, "if the indebtedness of a stock corporation exceed the amount of its capital stock the directors and officers, of such corporation, assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation," the obligation of such directors is not to some particular creditor; but, to all the creditors. The object and purpose of such section is that all claims, arising under its provision, shall be regarded in the nature of a trust fund, to be marshalled and distributed, pro rata, among all the creditors. This can be done only in a court of equity; Low, use etc., v. Buchanan, 6-454.

18. —. A general incorporation act provided that the officers of any corporation organized thereunder, who should intentionally neglect or refuse to perform any of the duties required by the act to be performed, should be jointly and severally liable in an action founded on the statute, for all debts of such corporation, contracted during the period of any such neglect or refusal. Defendants, as directors of a corporation, had rendered themselves liable under the act. Plaintiffs had a claim against a creditor of the corporation and, afterward, obtained judgment against the corporation on a scire facias. The judgment was not paid and they brought an action under the statute against defendants upon their personal liability for the debt attached. It was held: 1. That the indebtedness of the corporation, upon the judgment in scire facias, was not a debt contracted "within the meaning of the statute"; 2. That the right of plaintiffs' original debtor against defendants did not constitute a claim which plaintiffs could enforce by action at law; 3. That if those rights constituted a "security" for the debt attached to the benefit of which plaintiffs were entitled, under the foreign attachment act, yet the benefit

of such security could be obtained only by proceeding in equity; *Armstrong et al. v. Cowles et al.*, 6-325.

19. BY WHAT LAW FIXED. The personal liability of a stockholder becomes fixed according to the law which is in force at the time he becomes a stockholder. The liability so fixed can not be changed by subsequent enactment, be it by constitution or statute; *Fairchild v. Masonic Hall Assoc.*, 8-278.

20. FOLLOWS STOCK. Where a corporator is liable personally for debts of his corporation, the cause of action, upon his death, survives against his estate; *Chase v. Lord et al., exec'rs*, 8-575.

21. WHEN IT ATTACHES. Under the statute of the state of Missouri, the liability of the stockholder attaches at the date of execution issued against the corporation, of which he is a member; *Griswold v. Seligman*, 8-247.

22. OF TRUSTEE AND STOCKHOLDER. There is no legal distinction in respect to liability, to the creditor of a corporation, between a trustee and a simple stockholder, where neither contracted a debt nor authorized another to represent him in the transaction; *Central City Sav. Bk. v. Walker et al.*, 8-464.

23. WHERE LIABILITY ACCRUES. An action will be sustained, in Michigan, under the conditions of the statute, against a stockholder of a corporation, when the cause of action arises upon the improper declaration or payment of a dividend, or upon a contract for labor performed, or for debts contracted. Such an action arising on a claim founded on a pure tort is not included, but is excluded; *Bohn v. Brown*, 6-582.

24. WHEN IT ACCRUES. The officers and stockholders of a corporation can not be charged with the debts of the corporation unless upon strict compliance with statutes creating the liability; *Chamberlin v. Huguenot Manuf. Co.*, 7-446.

25. IN RESPECT OF TIME. In a suit to recover of a stockholder who has not paid up his subscription, the creditor must make it appear that the party sought to be charged with liability was a stockholder at the time the indebtedness accrued; *Weber v. Fickey, jr., use of etc.*, 7-385.

26. MODE OF FIXING. The constitution of Illinois, of 1848 (art. 10, § 2), not having directed any specific way in which "dues from corporations not possessing banking powers or privileges, shall be secured," and allowing it to be "by such individual liabilities of the corporators as may be prescribed by law," any means provided by the general assembly for that purpose would seem to meet that requirement, and should the general assembly determine to secure such dues by individual liabilities, of the corporators, there is no restriction or limitation as to the manner in which it shall be done. It may, therefore, secure such dues by making the corporators liable individually to penalties, as a reasonable and effective mode; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

27. **EXEMPTION FROM.** No person will be regarded as holding stock as a trustee or by way of collateral security, and, therefore, exempt (Wag. Stat., Mo., 301, § 9) from liability as a stockholder, unless it has come in to his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued, by the corporation, in the ordinary course of business; *Fisher v. Seligman*, 9-501.

28. —. Where an attempt is made to incorporate, under a general incorporation law, and there is a non compliance with the law in a material respect, there is such want of incorporation that exemption from individual liability is not secured; *Kaiser v. Lawrence Sav. Bank*, 6-574.

29. **INTEREST.** The personal liability of the stockholder under a statute which provides that, in the event the capital stock be not paid in, the stockholder shall be liable to creditors for the corporate debts is a primary liability, consisting both of principal and interest, and the liability to pay includes the accrued interest up to the statutory limit of the liability. When that limit is reached, any further interest runs only upon that sum from the date of the commencement of the action; *Wheeler v. Millar*, 9-647.

30. **UPON DISSOLUTION.** In view of a provision of law, providing that stockholders of a corporation shall be liable for all its debts at the time of its dissolution, to the extent of its stock, there is a dissolution, so far as the rights and remedies of creditors are concerned, whenever the corporation becomes inert, its property and funds are gone and it is reduced to insolvency, so that legal remedies against it are fruitless and unavailing; *Central Agric. & Mech. Ass'n v. Ala. Gold Life Ins. Co.*, 9-8.

31. **ENFORCEMENT OF, AS TO SUBSCRIBERS.** The court follows and applies the rule laid down in *Allen v. Walsh* (7 Amer. Corp. Cas., 634), as to the manner of enforcing the individual liability of a stockholder in a manufacturing corporation, in a case not falling within the provisions of the general statutes of 1878, chapter 34, § 9. The action, for that purpose, must be in the nature of a suit in equity, prosecuted by, or in behalf of, all creditors and against the corporation and all the stockholders upon whom such liability rests; *Johnson v. Fischer*, 9-498.

32. **UNPAID BALANCE OF SUBSCRIPTION.** As between stockholders and creditor, stock is to be considered paid for, only to the extent of the fair value of the property actually transferred as consideration for it. For the balance the stockholder should be held individually liable, in the event of his failure to point out corporate property subject to levy; *Moss v. King*, 6-514.

33. —. Where persons become stockholders of a corporation, with the understanding that calls are not to exceed a certain per cent. and, afterward, calls are made in excess of that amount,

to compensate for which second mortgage bonds are issued to these stockholders, they are liable to the creditors of the corporation for unpaid stock to the amount realized by the sale of the bonds; *Skrainka v. Allen*, 9-522.

34. UNPAID BALANCE OF SUBSCRIPTION. When creditors of a corporation shall have exhausted their remedy at law, they may proceed in equity to obtain satisfaction of their judgments, against a stockholder, to enforce his liability to the company, for the amount due upon his subscription, although no account is taken of the other indebtedness to the company, and the other stockholders are not made parties; *Hatch v. Dana*, 6-63.

35. —. In such case it is no defense that the stockholder subscribed for the number of shares set opposite his name "as called for by the company." If demand for the payment was not made, this was a violation of the trust imposed on the corporate officers, and stockholders can not protect themselves by setting up the defaults of their own agents. *Id.*

36. LOAN TO COMPANY AS DEFENSE. It seems that a loan of money to a manufacturing corporation by one of its stockholders, in the absence of evidence to the contrary, justifies an inference that the money was applied to the payment of the obligations of the corporation, in the usual course of business; in an action, therefore, by a creditor of the corporation against a stockholder, to enforce the liability imposed by the general manufacturing act (Laws, N. Y., 1848, ch. 40, § 10) upon a stockholder who has not paid for his stock, evidence of a loan by defendant to the corporation to an amount equal to his stock constitutes a defense. The fact that security was taken for the loan is immaterial; *Agate v. Sands*, survivor, 8-533.

37. STOCKHOLDER, ALSO A CREDITOR. Where a stockholder is a creditor of the corporation to an amount equal to his stock and the debt is one for which the stockholders are individually liable, an action at law can not be maintained against him by another creditor; as he has an interest in the fund sued for, the amount of which can only be determined by an accounting, which can not be had in such an action because the proper parties are not before the court; *Mathez v. Neidig*, 8-507.

38. —. Where the claim of the stockholder, as creditor, is for advances to the company, his liability to other creditors in an action of law is not affected by the question whether the money advanced was used to pay obligations for which he was individually liable or not. *Id.*

39. —. To enable a stockholder in a corporation who is also a creditor to avail himself of his defense, it is not necessary that he should bring himself within the provisions of the act limiting the personal liability of stockholders to debts which are to be paid within one year and requiring suit to be brought against the company within that time. *Id.*

40. **STOCKHOLDER, ALSO A CREDITOR.** Where a stockholder, who was also president of a manufacturing corporation, advanced to it money to pay its workmen and paid out the same to such workmen, the court of appeals held that he, thereby, became a creditor, and, as such, had his defense to an action by another creditor of the corporation against him as stockholder; and this was so even if defendant had been compelled to pay the claims in discharge of the liability imposed by the act upon stockholders to pay laborers and assuming that this liability was in addition to that to pay creditors. *Id.*

41. **OF STOCKHOLDER.** To sustain a claim of a right, by contract, to vote stock in a corporation, without incurring the obligations of a stockholder, it must appear that, at the time the stock was voted, there was a contract in force authorizing the holder to vote it. Hence, where a corporation deposited its own unpaid and unsubscribed stock with a banking firm, as security for advances to the corporation, to be held by the firm for the period of one year, but with no provision for voting the stock and, after the lapse of the year, the firm did vote and, thereby, elected their own board of directors, and so, ultimately, obtained complete control of the corporation, it was held, that they had brought themselves within the law as liable to creditors, as laid down in *Griswold v. Seligman*, 8 Amer. Corp. Cas. 247; *Fisher v. Seligman*, 9-501.

42. **SHAREHOLDER OF NATIONAL BANK.** While it may be true that a bank organized under the national banking law may not be bound to admit a purchaser of shares of stock in the association to all the rights and liabilities of the prior holder, unless the transfer is made on the books of the bank in the manner prescribed by the by-laws or articles of association, yet where it does issue certificates of shares to a subsequent purchaser, in lieu of the certificates of the prior owner, without observing its by-laws, so far as creditors of the bank are concerned, a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the national banking law; *Laing, adm'r, v. Burley*, 9-107.

43. **SCHEMES TO AVOID.** Courts have been sedulous in their endeavors to defeat all schemes and contrivances whereby parties may seek to receive and enjoy the benefits and privileges incident to the position of stockholder and at the same time be exonerated from the burdens imposed by the law; *Fisher v. Seligman*, 9-501.

44. **TRANSFER OF STOCK TO AVOID.** A transfer of stock in an insolvent corporation, which such corporation refuses to make upon its books, is inoperative and void as against creditors existing at the time of the transfer, in the absence of proof that it was made in good faith and to a solvent person; *Central Agric'l & Mech'l Ass'n v. Ala. Gold Life Ins. Co.*, 9-8.

45. **ESTOPPEL.** One who would be estopped to deny, as against a corporation, that he is a stockholder therein, will also be held

estopped as against a judgment creditor of the corporation; *Fisher v. Seligman*, 9-501.

46. STOCK ISSUED NOT FOR CASH. A statute authorizing the trustees of a corporation to purchase property "necessary for their business and to issue stock to the amount of the value thereof, in payment therefor" authorizes such trustees to purchase and issue stock in payment at a fair valuation, considering the purposes for which the property is to be used and the nature of the business. An honest over valuation will not, of itself, subject the owner to a personal liability; *Boynton et al. v. Andrews*, 8-439.

47. —. Where, however, it appears that property, the value of which is well known and understood, or capable of being easily ascertained, is purchased at a price far beyond its real value, a strong presumption of fraud is raised and, unless rebutted by evidence fully explaining the apparent bad faith, the transaction is fraudulent in law and no question of fact exists to be presented to a jury. *Id.*

48. STOCK ISSUED FOR PROPERTY TRANSFERRED. The provisions of a general incorporation act (see Laws of New York, 1848, ch. 40, § 10) making holders of stock not fully paid personally liable to creditors of the corporation applies to holders of stock issued under authority of an amendatory act which confers authority, upon the trustees of a company, to purchase property "necessary for their business and to issue stock to the amount of the value thereof, in payment therefor;" *Boynton et al. v. Andrews*, 8-439.

49. STOCK FOR PROPERTY PURCHASED. To charge the holder of stock in a manufacturing company, issued upon and for the purchase of property, individually, for the debts of the company, it is not enough to prove that the property was purchased at an over valuation through a mere mistake, or error of judgment, on the part of the trustees; it must be shown that the purchase was in bad faith and to evade the statute; *Douglass v. Ireland*, 8-517.

50. —. All that is necessary, however, to establish legal fraud, which will take the stock, issued upon for the purchase of property, out of the protection of the statute of New York of 1853 (Laws of 1853, p. 705, ch. 333), is to prove; 1, that the stock exceeded in amount the value of the property in exchange for which it was issued; and, 2, that the trustees so issued it deliberately and with knowledge of the real value of the property; no other fraudulent intent need be alleged or proved. *Id.*

51. —. An action brought against defendant and other trustees, to charge them with the same debt because of a failure to make an annual financial report, is no bar to an action to recover by reason of fraud in the issue of stock for property purchased. *Id.*

52. INSTANCE. In an action against a holder of stock of a manufacturing corporation, issued upon and for the purchase of property, to charge him individually with the debts of the company, it appeared that the entire capital stock of the corporation, \$300,000,

was issued to H., one of its trustees, in consideration of the assignment to the company of two executory contracts for the purchase of mining property, upon which nothing had been paid; the contract price was \$40,000. One-third of the stock was immediately re-transferred to the company, to be sold to raise a working capital. This was sold at from forty to sixty cents on the dollar. Defendant knowing of, and participating as trustee of the corporation in, the transaction, purchased \$25,000 of said stock at forty cents. The jury found the value of the property to be \$64,000. The court held that the evidence justified a finding of fraud and that a recovery should be sustained. *Id.*

53. ENFORCEMENT. In an action brought to enforce the personal liability of a stockholder, as the holder of stock not fully paid, which stock has been issued in payment for property purchased from him, the question is whether the purchase was made in good faith or at a high valuation, with a fraudulent intent to evade the provisions of the law; *Boynton et al. v. Andrews*, 8-439.

54. LIABILITY OF PLEDGEE OF STOCK. One who receives a certificate of stock in a corporation as collateral security for a debt, the statute providing that stockholders shall be jointly and severally liable for the debts of the corporation contracted before the original capital is fully paid in to the extent of the par value of the stock held by him, is subject to such liability, unless his certificate shows that the shares of stock are so holden. If he claims exemption the onus probandi is on him; he must show the form of the certificate; *Nat. Bank v. Hingham Manuf. Co.*, 7-496.

55. WHEN AS PARTNERS. Where persons accept and adopt a charter which is repugnant to the constitution, and subscribe to the articles of association, by which articles they agree to become liable under the charter and it provides for a liability, as individuals, to the creditors of the company, each person so subscribing assents to an agreement he will be so liable and the creditor may enforce such liability in his own name; *M'Carthy v. Lavasche*, 6-419.

56. FAILURE OF PROPER ORGANIZATION. Individual corporators are liable for failure to do those things which are necessary to the transaction of business, and will be liable in the event of neglect to do the things upon which the validity of corporate action depends, for all debts, the same as if there was no corporation; *First Nat. Bk. of Davenport v. Davies*, 9-517.

57. FAILURE IN ORGANIZATION WHICH PRODUCES. Upon failure to properly organize, where there is a failure upon the part of corporators to make publication of the adoption of articles of association, or incorporation, required by code, the immunities consequent upon corporate existence will not attach. In such case there will be a failure substantially to comply with the requirement of statute in respect both of organization and publicity; *Eisfield v. Kenworth et al.*, 6-546.

58. PUBLICATION OF NOTICE OF INCORPORATION. Failure to publish notice of incorporation is, in Iowa, a substantial failure to comply with the pre-requisites of immunity from individual liability. *Id.*

59. ABORTIVE ACTS TOWARD INCORPORATION. Where one, of an association of persons charged as partners, seeks relief from liability on the ground that such association is a corporation, lawfully organized and doing a corporate business, the burden of proof rests on him to show the existence of the corporation. Failing to establish this he can not avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. In such a case the question of fact is not so much whether the person has held himself out as a partner, as whether he was a member of the company, assuming to act as a corporation, holding himself out to the public and engaging in its transactions as such; *Abbott v. Omaha Smelting & Refining Co.*, 8-305.

60. OF OFFICERS. In an action, under the code of Iowa (§ 1071), to render the officers of a corporation personally liable for their conduct of the affairs of the company, intentional fraud on the part of such officers must be shown. It is not sufficient the year, by the evidence, chargeable with neglect, or, even, non compliance with the law; *Hoffman v. Dickey et al.*, 6-567.

61. GROSS NEGLIGENCE OF DIRECTORS. The directors of a corporation are liable for losses sustained by reason of gross negligence and inattention to the duties of their trust; this upon general principles of equity and independent of statute; *Brinckerhoff v. Bostwick, rec'r*, 9-610.

62. —. An action may be maintained by the receiver of a national bank, against its directors to recover damages sustained by reason of the gross negligence and inattention of such directors to the duties of their trust. In the event such receiver is one of the directors chargeable with neglect of duty the action may be maintained by the stockholders and when the stockholders are numerous the action may be instituted and conducted by one, or more, in behalf of all. *Id.*

63. DECLARING DIVIDEND NOT EARNED. The provisions of a statute declaring the trustees of a corporation—in this case a savings bank—who vote for the declaring and crediting of any interest or dividend in excess of the interest or profits earned, personally liable to the corporation for the amount of the excess, does not limit the interest, which may be lawfully voted for, to net profits. If a trustee votes for a dividend less than the whole amount of interest or profits earned, without any deduction therefrom for expenses, although the earnings have not been actually received, he does not, in the absence of fraud or bad faith, over step his statutory duty and is not liable to the penalty; *Van Dyck, rec'r, v. M'Quade*, 9-582.

64. ACTION AGAINST DIRECTORS FOR FRAUD. A petition, in a

suit brought by a stockholder, against certain directors of a corporation, for a fraudulent breach of trust in dealing with the corporate property, failed to show either that the corporation had refused to sue or that it was under the control of the defendant, but no objection was made, on that ground, until the cause reached the supreme court. Such objection could not then be sustained, albeit, if made in time it would have been; *Bulkley v. Big Muddy Iron Co. et al.*, 9-533.

65. DEFECTIVE RECORD. A trustee, in an action against him to recover a penalty prescribed by statute for declaring a dividend from profits not earned can not avoid liability, because the manner of voting and of recording the vote prescribed by statute was not followed; the direction of the statute is made for his protection and he can waive it; he can not avail himself of the omission; *Van Dyck, rec'r, v. M'Quade*, 9-582.

66. INSTANCE. The Yorkville Savings Bank, of which the defendant was a trustee, in pursuance of the requirements of its charter, at the opening of the bank, posted notices of the rate of interest to be paid by it upon deposits, and thereafter paid interest at the rate stated, to January, 1877. In an action brought by a receiver of said bank, appointed during July, 1877, to recover the interest so paid, the referee found that the interest, received from investments of the funds of depositors exceeded the interest paid them, but that the expenses exceeded the earnings and income of the bank. No fraud, or other mis-conduct, or want of ordinary care or skill, was imputed to defendant. It was held that defendant was not liable. The order of payment of the debts of the bank, and such portion of its profits as the trustees might, from time to time, divide, related to its general business, which was left to the judgment of the trustees, and so long as that judgment was exercised in good faith, in the due course of management, no common law liability was incurred; nor was there any injury to the corporation, so that, in the light of the common law, there was no rule by which damages could be assessed. Furthermore, no liability was imposed under a statute, to which the corporation was subject, so far as applicable, prohibiting the payment of dividends to stockholders, save from "surplus profits," for such statute has no application; the interest payable to depositors in a savings bank not being dividends within the meaning of the statute. Also, that no liability attached under the provisions of an act declaring the trustees of a savings bank, who vote for a dividend in excess of the interest or profits earned, liable to the corporation for the amount of the excess, inasmuch as the interest paid was not in excess of that earned. *Id.*

67. STATUTORY. Where a statute requires a corporation to make, publish and file a report and provides that in case of default the managing officers shall be personally liable for all debts incurred during the period of default in such publication, the liability of a

trustee, upon the failure of the corporation to make such report, is co-extensive and concurrent with that of the corporation, quoad the debt which is sought to be fixed upon him (*Jones v. Barlow*, 62 N. Y. 202). If a valid debt exists against the corporation to which there is no good defense, at law or equity, in behalf of the corporation, it must be adjudged and held a valid debt where the trustee is sought to be charged with its payment; *Whitney Arms Co. v. Barlow et al.*, 8-425.

68. **NEGLECTS OF DIRECTORS; FAILURE TO REPORT.** A general statute, relating to the incorporation of associates (Gen. Stats. of Nebraska, 200, ch. 11, § 136), provided that every corporation, thereafter created, should give notice, annually, in some newspaper published in the county, or counties, in which its business was transacted etc., of the amount of all the existing debts of the corporation and in the event of default herein, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing and for all that shall be contracted before such notice is given. Default of publication being shown, the stockholders are jointly and severally liable for all debts contracted by the corporation while the officers are in default. The liability is in no wise affected by a constitutional provision limiting the liability of stockholders to the extent of their unpaid subscriptions to stock, which applies, only, to a state of case where there is a substantial compliance with the law governing the corporate organization and existence; *Smith and Crittenden v. Steele*, 8-322.

69. **OF TRUSTEES; FAILURE TO REPORT.** In an action against a trustee of a manufacturing corporation to enforce a statutory liability, imposed upon such officers, in case of the failure of the corporation to make, file and publish an annual report, or financial statement, the burden is upon the plaintiff to prove the default, and it matters not that this could only be done by proof of a negative. The statute being penal in its nature, no thing can be presumed as against the defendant trustee and every fact necessary to establish his liability must be affirmatively proved; wherefore, it appearing that a sufficient report was made and filed, it was not incumbent on defendant to show the publication thereof; *Whitney Arms Co. v. Barlow*, impleaded etc., 8-425.

70. —. An act imposing upon trustees liability for the debts of their corporation because of a failure to make, publish and file, at stated periods, a financial report is of a penal character, in so far as it subjects the trustees to liability for the debts of the corporation for their neglect to make the report. It is remedial in so far as it confers upon the creditor a remedy for his debt and takes from the governing body of the corporation the protection of the corporate organization and holds them to a personal liability for debts contracted. *Id.*

71. OF TRUSTEES; FAILURE TO REPORT. Assuming that causes of action, under the act of New York for the incorporation of manufacturing companies, for an omission to file an annual report and for making and filing a false report, may be united in one action, of which quære, the penalties being different and the parties subject thereto not necessarily identical, and that a false report may be regarded as no report, yet, in order to justify such union, each of the causes of action must affect all the parties defendant; *Bonnell v. Griswold et al.*, 8-489.

72. —. Where, in an action, against trustees of a manufacturing corporation, to enforce the liability imposed upon them by a general law, for a failure to make, publish and file on or before a day fixed, an annual report which shall state the amount of capital and of the proportion actually paid in and upon the issuance of stock for property purchased, if any, according to the fact and the amount of the existing corporate debts, it appears that a report professedly in compliance with the statute was made and filed, in the absence of any evidence of an attempt to deceive, or evade the statute, such report will receive a liberal interpretation and the benefit of any doubt as to its true intent and meaning will be given to the trustees sought to be charged; *Whitney Arms Co. v. Barlow et al.*, 8-425.

73. —; FAILURE TO MAKE REPORT. To meet the requirements of the New York incorporation act, of 1848, in relation to manufacturing companies, it is not necessary that the annual report shall be published and filed within twenty days from the first of January. When the report is prepared, signed and verified within that time and is filed and published as soon as is practicable thereafter, it is sufficient. So, where a report was signed and verified on the twentieth of January and was, on the same day, mailed to the county clerk, by whom it was received and filed on the twenty-second and a copy was, also, mailed on the twenty-first to a newspaper and was published therein on the twenty-fourth, it was held there was a sufficient compliance with the statute; *Cameron et al. v. Seaman et al.*, 8-494.

74. —. Under the provision of the New York manufacturing act (§ 12) requiring that in case no newspaper is published in the town, city or village where the business of the corporation is carried on, the annual report shall be published "in some newspaper published nearest the place" of business, where the business is carried on in a town, the town is the place of business within the meaning of the act; and publication in a newspaper published nearer to a point in the town than any other newspaper is to the same point, is a substantial compliance with the requirement, although such other newspaper may be published nearer to some other point in the town. *Id.*

75. INSTANCE. The capital stock of a corporation was \$300,000, all of which had been issued in payment for patent rights. A

report was made and filed stating that "the amount of the capital stock of this company, and which had been issued for the purchase of patent rights and which has not been paid in cash, is \$300,000." This was held to be in substantial compliance with the statute and sufficient to save the trustees from liability; *Whitney Arms Co. v. Barlow et al.*, 8-425.

76. FAILURE TO REPORT. A statute (Rev. Stat., Ind., 1881, § 3638) requires from directors of a corporation a financial statement, made out, sworn to, attested and recorded within fifteen days from the first day of July in each year. Failure so to report is an offense, punishable by fine. The directors who are subjected to the penalty are those who are in office at the time fixed by law for the making of the statement; their successors are not liable; *State v. Cox et al.*, 9-277.

77. FALSE FINANCIAL REPORT. Where in an action against the trustees of a manufacturing corporation, to enforce the liability imposed by the manufacturing act of New York (Laws of 1848, ch. 40, § 15), for the making of a false report, the sole falsity of the report is in a statement that the capital stock has been paid in full, without stating that all or a portion was paid for in property, as required in the act of 1853 (Laws of 1853, ch. 333), when such is the case, to sustain the action, proof is necessary of some fact or circumstance indicating bad faith — a willful or fraudulent purpose — on the part of defendants. The penalty follows an actual, not a constructive, falsehood; *Bonnel, jr., v. Griswold*, implied etc., 9-630; *Eli W. Blake v. Griswold*, implied etc., 9-630.

78. UNTRUTHFUL REPORT. A statute provided variant liabilities as the penalty of the non publication of a report and the falsification of a report published. An action was brought to recover of a trustee upon an allegation of non publication. On appeal plaintiff claimed the report was untrue. If such claim was well founded it is not available in this proceeding. The allegation is of non publication and defendant is not called on to meet a charge of falsification; *Whitney Arms Co. v. Barlow*, implied etc., 8-434.

79. FINANCIAL REPORT UNTRUE. A statute required a corporation to publish and file, within a period of time prescribed, a report "which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts," and for a failure of the corporation so to report all the trustees were made liable. Where a report is filed, which in form complies with the requirements of the statute, the trustees are not subject to the liability, nevertheless, the report filed is untrue. If the report filed be untrue and constitutes a false representation, such trustees only who sign it, with knowledge that it was untrue, are liable; *Pier v. Haninore*, 9-595.

80. —. It would seem that where a financial report re-

quired to be published and filed, states the amount of capital paid in, and the trustees are authorized to purchase property necessary to the business of the corporation and issue stock to the amount of the value thereof in payment therefor, and there is no statement that a portion was paid for in property, such being the fact, the fair import of the statement is that the payment for the stock was in cash. Such a report, therefore, where a portion of the stock was issued in payment for property is false, and the misrepresentation is material, making the officers signing a report which "is false in any material representation," knowing it to be false, liable. *Id.*

81. **KNOWLEDGE.** The words "knowing it to be false," mean a wilful misrepresentation with actual knowledge of its falsity; not merely such constructive knowledge as can be imputed from the presumption that the officer knew the law and comprehended the precise import of the language used, when construed with reference to statute. To charge an officer, therefore, in such a case, for a statutory penalty imposed, some fact or circumstance must be shown indicating that it was made in bad faith or wilfully — not ignorantly or inadvertently. *Id.*

82. **INSTANCE.** Defendant, as trustee of a manufacturing corporation, signed a report stating that \$36,500 of capital stock had been paid in. In fact, to defendant's knowledge, when he signed, \$25,000 of stock had been issued for property purchased and \$11,500 in cash. In an action to enforce a liability imposed by statute for the publishing etc. of a report which "shall be false in any material representation . . . knowing it to be false" it was held that as it was not certified, in terms, that the amount stated had been paid in cash, and as it was only established by a process of reasoning that the statement imported a representation that it was so paid, if defendant signed believing he had a right to treat all the stock issued as representing paid up capital and without intent to evade the statute or to defraud any one, he did not sign knowing the report to be false within the meaning of the provision; and so, that, in the absence of any evidence warranting a finding of bad faith, or intention to deceive, or any fraudulent purpose whatever, defendant was not liable for the penalty. *Id.*

83. **ENFORCEABLE BY ASSIGNEE.** An assignee of a claim against a manufacturing corporation may maintain an action against a trustee thereof, to enforce the liability for its debts, given by a statute, because of failure to file an annual report, or because of signing a false report; *Pier v. George*, 9-601.

84. **EFFECT OF RECEIVERSHIP.** Where a receiver was appointed of the property and effects of a corporation, during and before the expiration of the twenty days in which the trustees were required to make and publish an annual financial statement, such trustees were not liable to the penalty imposed, by the general manufac-

turing act (Laws of N. Y., 1848, ch. 40, § 12), for failure to make, file and publish the same; *Huguenot Nat'l Bk. etc. v. Studwell et al.*, 8-554.

85. **TRUSTEE; NOT LIABLE.** The fact that a stockholder of a manufacturing or mining corporation was elected a trustee, does not alone invest him with that character, so as to make him liable for the debts of the corporation, because of a failure to file an annual report, as required by the general statute for the incorporation of manufacturing companies (Laws of 1848, ch. 40, § 12). There must have been an acceptance of the office on his part, either express or to be implied from circumstances; *Cameron et al. v. Seaman et al.*, 8-494.

86. **CREDITOR ALSO A STOCKHOLDER.** Where by statute the creditor may sue the individual stockholder to recover from him the amount of the debt due by the corporation, a stockholder, being a creditor, has the like remedy, if he is not liable to the corporation on his stock; that is, if it be fully paid up; *Smith et al. v. Londoner*, 6-302.

87. **PENAL NATURE OF.** An act prescribing the liability of trustees of corporations, arising from a failure to publish an annual report, is penal in its nature; the liability is not founded upon contract, but arises from misconduct in office. The repeal of such a statute, without any saving-clause in the repealing statute, sweeps away all inchoate rights arising under the statute so repealed. There can be no such thing as a vested interest in an unenforced penalty; *Gregory v. German Bank of Denver*, 6-282.

88. **EXTENT OF LIABILITY.** Where a subscriber to the stock of a manufacturing corporation subscribed for fifteen shares, but, before he became liable upon his subscription, by reason that the capital stock was not fully subscribed for, and before any indebtedness was incurred, upon his application his subscription was reduced from fifteen to ten shares, by unanimous assent of the board of directors, and he received a certificate for but ten shares and participated, and was allowed only to participate, as a stockholder, to the extent of such ten shares, his liability to a creditor was held to be upon the basis of the extent of his participation only. From the amount of the value of the reduced number of shares, is to be deducted such sums, if any, as he has been compelled to pay as a stockholder to other creditors and the amount of any judgments, if any, rendered against him as such stockholder; *Garling v. Baechtel et al.*, 7-345.

89. **LIABILITY SEVERAL.** In suits to recover against stockholders, upon indebtedness of their company, for the amount of their liabilities on stock held by them, the action must be against each one severally, the stockholder compelled to pay being left to recover, from his associates, by way of contribution; *Perry et al. v. Turner et al.*, 8-111.

90. **LIABILITY DECREASES AS DEBT IS PARTLY PAID.** Whenever the debt of a corporation is satisfied in part, there is, also, pro tanto, a discharge of the liability of the stockholder; wherefore, in an action against a stockholder, to recover from him his proportion of a corporate debt, which had been partially satisfied by a sale of property, which had been mortgaged and pledged, the defendant was liable only for his proportion of the indebtedness of the corporation which remained due, after all payments on account had been credited; *San Jose Sav. Bank v. Pharis*, 6-279.

91. **NOT FOR TORTS.** A statute which provides that stockholders shall, certain contingencies happening, be liable for the debts of their corporation, does not include damages awarded for the torts of the officers or agents of the corporation but only debts arising upon contract, expressed or implied; *Doolittle v. Marsh*, 8-335.

92. **DOES NOT EXTEND TO TORTS.** Where there is the breach of the contract of carriage, by negligent injury of a passenger who is being carried, for which injury the passenger has recovered judgment, upon which execution has issued against the company and been returned nulla bona, the statute of Michigan does not afford a remedy against the individual stockholder; *Bohn v. Brown*, 6-582.

93. **DAMAGES FOR NEGLIGENCE.** The liability of a carrier for an injury to a passenger, caused by the negligence of the servant of a corporation, though it may be sued on either in assumpsit, for the breach of contract to carry safely, or specially on the case, upon the negligence of the carrier, is one the real gist of which is the wrongful act of the carrier, and, in its essential ingredients, based on the tort. It is, therefore, not within the meaning of the words "debt contracted." *Id.*

94. **LABOR DEBTS.** A stockholder is not liable, as for a labor debt due, under a contract with a corporation, whereby the contractor is to carry on certain operations at his own expense and for a term of years; as quarrying in a quarry owned by the company and the delivery of the rock excavated to the corporation at specified rates; *Taylor v. Manwaring*, 7-596.

95. —. A statute of New York (Laws of 1863, ch. 63, § 2), to extend the operation and effect of the general manufacturing act, provided that corporations formed under it "shall be subject to all the provisions, duties and obligations" of the original act. The provision of said act (Laws of 1868, ch. 40, § 18) making stockholders "liable for all debts that may be due and owing to their laborers, servants and apprentices for services performed for such corporations," is made applicable to stockholders of corporations organized under the act of 1863; *Wakefield v. Fargo et al.*, 9-643.

96. —. One employed at yearly salary as a book keeper and general manager is not a laborer, servant or apprentice within the meaning of the provision last above mentioned. *Semble*, that the

services are menial or manual services, performed by one of a class whose members usually look to the reward of a day's labor or service for immediate or present support. *Id.*

97. **LABOR DEBTS.** A traveling salesman employed by a corporation is not a laborer within the meaning of the constitutional provision, of the state of Michigan, which makes stockholders liable for labor debts; *Jones v. Avery*, 9-488.

98. **REPEAL OF CONSTITUTIONAL CLAUSE.** The constitution of a state provided that in all cases each stockholder shall be individually liable, over and above the stock by him, or her, owned and any amount unpaid thereon, in a further sum, at least, equal in amount to such stock (Const. Mo., 1865, art. 8, § 6). This clause was by amendment repealed (Amend. 1870, art. 8, § 6). A stockholder in a corporation, who becomes such after the repeal of the double liability clause is not liable in double the amount of his stock, for debts owing by the corporation prior to the repeal; *Ochiltree v. Iowa R.R. Contracting Co.*, 8-99.

99. **PRE-REQUISITE TO ENFORCEMENT.** Under the provisions of a general incorporation law (Laws of N. Y., of 1848, ch. 40) requiring as a condition precedent to the bringing of an action against a stockholder of a corporation organized under the statute, to enforce his liability to a creditor of the corporation, imposed by the act, that judgment shall be recovered against the corporation and execution issued and returned unsatisfied, a proceeding in rem, affecting only property of the corporation attached, and execution against that property is not a compliance with the condition; *Rocky Mountain National Bank of Central City v. Bliss*, 9-636.

100. —. The recovery of a judgment and issuing an execution in another state is not a compliance with said condition. It requires a judgment in and execution issued out of a court of the state which enacted the enabling statute. *Id.*

101. **REMEDY.** The individual liability of the stockholder created by statute is to be enforced at law, unless the statute provides a remedy in equity. This is in no wise changed by reason that the affairs of the corporation have passed in to the hands of a receiver; *Wincock et al. v. Turpin*, 6-473.

102. **REMEDY TO ENFORCE.** Where a statute creates a legal right or liability, and does not determine the form in which the remedy shall be sought, the remedy is in a court of law; *McCarthy v. Lavasche*, 6-419.

103. —. It would seem that if the statute created a joint liability of the stockholders, for the debts of the corporation, and not a several and individual liability, a court of equity would be the appropriate forum in which to enforce the liability; *Wincock et al. v. Turpin*, 6-473.

104. **REMEDY OF CREDITORS.** The code of Mississippi (section 2413, code, 1871) provides that "in all joint stock corporations

each stockholder shall be individually liable for the debts of the corporation, contracted during his ownership of stock, for the amount that may remain due, or unpaid, for the stock subscribed for by him, and may be sued by any creditor of the corporation " etc. Under this section each stockholder is severally liable to, and may be sued by each judgment creditor of the corporation; but, exceptional circumstances must be shown to justify a suit by one against many, or by many against one, or all. The statute seems to contemplate an action at law as the remedy; but, as to whether a bill in equity would not lie, the court expresses no opinion; *Vick et al. v. Lane, Hazlehurst & Co.*, 8-51.

105. **THE REMEDY AGAINST STOCKHOLDERS.** It has been held, by the supreme court of Illinois, that an action at law by a single creditor will lie against any stockholder of an insolvent corporation, to enforce an individual liability created by its charter; but these rulings are not to be taken as a denial of the right to seek relief in a court of equity when there are equitable grounds therefor. The right to sue at law does not necessarily exclude the jurisdiction of a court of equity; *Eames v. Doris*, 9-129.

106. —. Where the personal liability of stockholders of a corporation is made, by a statute, a common fund for the benefit of depositors of trust and savings funds, and the debts due such depositors greatly exceed the assets and such personal liability combined, so that the funds will be insufficient to discharge all of the claims upon it, a court of equity may, at the suit of a part of the creditors, on their own behalf and that of all other such creditors, take jurisdiction, and bring before it all the stockholders and depositors, and determine their several rights and liabilities, and adjust equities, marshal the fund, and distribute it pro rata, and in such case enjoin the prosecution of suits at law by individual creditors against stockholders seeking to appropriate the entire and unequal benefit of such security. The securing of a ratable distribution of such fund among all the creditors entitled to share is a proper ground for equitable jurisdiction; and so is the avoidance of a multiplicity of suits. *Id.*

107. **JOINT ACTION.** A statute (Rev. Stat., Ind., 1881, § 3883) provided that the stockholders of corporations formed under it "shall be liable, individually and jointly, to an amount equal to the stock held by them respectively." A creditor is authorized to join all the stockholders in action; *Overmyer et al. v. Cannon*, 9-241.

108. **REMEDY CUMULATIVE.** The provisions of the code of Georgia, concerning actions against corporations and other companies (code of 1873, 582, §§ 3367, 3375), are cumulative, not restrictive. So, where suit was brought against certain persons for material furnished in and about the erection of a building and a judgment prayed against them personally and, also, a lien foreclosed against certain property, which it was alleged they owned

as a joint stock company, a judgment against them as individuals was not so illegal as to be set aside on motion, or to be resisted by affidavit of illegality; *Mosely et al. v. Jones*, 9-53.

109. RESERVATION IN CHARTER, AS LIMITING THE MODE. A reservation in an amendment to the charter of a corporation—in this case an insurance company—of the right of the legislature to bring the corporation under the operation of general laws, does not bind the legislature to enact any specific law, and does not operate as a contract with the stockholders that they shall be subjected to any specific additional primary liability on their contracts of subscription. It only gives a discretion to enact such general law as the legislature, in its discretion, deems best for the public good, and such laws may be penal in their character as to the liability of stockholders; *Diversy v. Smith*, 9-155; *Burkett et al. v. Plankinton et al.*, 9-155.

110. TREATED AS PARTNERS; REMEDY. A charter of incorporation provided, "that, until \$30,000 of the stock shall have been paid in, every stockholder of said company shall be held individually liable for the debts of the company." Under this provision, the stockholders are jointly and severally liable, until the payment of the \$30,000, for all the debts of the company; and, they are to be held as having contracted their obligations as partners, not as guarantors. Where a creditor for any such debt is himself a stockholder, he can not sue at law, but must seek his remedy in equity; *Perkins v. Sanders et al.*, 8-53.

111. OF STOCKHOLDER, NOT ENFORCEABLE BY THE CORPORATION. The constitution of a state provided that a stockholder should be liable for the amount of his stock and for all sums unpaid upon the stock subscribed. This is not a liability which can be enforced by the corporation; but, only by creditors of the corporation; *Liberty Female College Ass'n v. Watkins*, 8-229.

112. REMEDY AGAINST DIRECTORS. Under a statute containing a provision that, "if the indebtedness of any company, organized under this act, shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess, to the creditors of the company" an action at law can not be sustained by one creditor, of many, for the liability created, or for any part of it. The remedy is in equity; *Hornor v. Henning et al.*, 6-1.

113. REMEDY TO ENFORCE DOUBLE LIABILITY. Where a constitutional enactment executes itself to the extent of imposing an individual liability on stockholders, but the legislature omits to prescribe the manner of enforcing it, or the statute fails to give a creditor a right of action in a court of law to enforce such liability, a court of equity is the appropriate tribunal to act; *Jones et al. v. Jarman*, 6-198.

114. DOUBLE LIABILITY. The constitution of the state of Missouri provided "dues from private corporations shall be secured

by such means as may be prescribed by law ; but, in all cases, each stockholder shall be individually liable, over and above the stock by him, or her, owned and any amount unpaid thereon, in a further sum, at least equal in amount to such stock." A statute (Wagner's statutes, 291, § 13 ; Gen. stat., 1865, 328, § 11), was adopted providing for the issue of an execution against any of the stockholders of the corporation to an extent equal in amount to the amount of stock by him, or her, owned, together with any amount unpaid thereon, upon a return of execution *nulla bona*, against the corporation. A stockholder of the delinquent corporation is not liable for double the amount of his stock, on execution against the company, the execution having been levied after the stock has been transferred on the corporate books, the transfer being in all respects complete ; *Miller et al. v. Great Repub. Ins. Co. etc.*, 8-82.

115. DOUBLE LIABILITY. A statute provided that if any company . . . dissolve, leaving debts unpaid, suits may be brought against any person, or persons, who were stockholders at the time of such dissolution, without joining the company in such suit. The liability of the stockholder was double, that is equal to twice the amount of stock by him held. Defendant could not be held liable for the entire amount of the corporate debt, but only in a sum equal to the amount of stock owned by him, together with the amount of his unpaid subscription ; *Perry et al. v. Turner et al.*, 8-111.

116. CHANGE OF CONDITIONS OF, BY SUBSEQUENT LEGISLATION. A constitutional provision, that "dues from corporations, not possessing banking powers or privileges, shall be secured by such individual liability of stockholders of the corporation, or other means, as may be prescribed by law," was designed to express the reservation of power in the general assembly in granting charters to provide, from time to time, by legislation, as experience should suggest or wisdom dictate, for the securing of dues from corporations, by individual liability of the corporators, or other means. It is not required, of necessity, that this should be done in the charters, and be made a condition precedent to the exercise of corporate powers, but rather to cast upon the legislature the supervising duty of ascertaining what legislation shall be necessary to attain the desired end, and then to provide it ; so that every stockholder in a corporation of a character not within the exception named, organized under that constitution, took his stock subject to this supervisory power of the general assembly, and to be affected by whatever legislation in that regard the general assembly might deem necessary ; *Weidenger v. Spruance*, 9-102.

117. —. The general insurance law of 1869, of Illinois, provides that "the trustees and corporators shall be severally liable for all debts or responsibilities of such company, to the amount by him or her subscribed, until the whole amount of the capital of such company shall have been paid in." The Commercial Insurance Company was organized under a special charter granted in 1865, which

did not prescribe as a condition to the liability of the individual stockholders that the entire capital of the company should be paid in, nor did the charter, as considered for the purposes of the decision, contain any reservation to the general assembly of power to amend it. Nevertheless, that provision of the act of 1869 was given effect as against the corporators or stockholders of the company for liabilities of the corporation accruing after the act went into effect—and this, by virtue of the reservation of power to the general assembly, in the constitution, to supervise, in that regard, the affairs of pre-existing corporations. In giving such effect to the act it was not regarded as an impairment of the obligation of the contract between the prior stockholders and the corporation, or the creditors of the corporation. The act simply required pre-existing corporations to cease to carry on business unless they should comply with its provisions and the liability imposed upon the stockholders is by way of penalty, only, for disobedience to this mandate. *Id.*

118. CHANGE OF CONDITIONS OF, BY SUBSEQUENT LEGISLATION. The charter of the company authorized the directory to call in such an instalment on stock subscribed as they might deem necessary—not less than twenty per cent. in cash—and the balance to be secured in a prescribed manner. Even if there was an implied authority, in the absence of any express grant of power to that effect, for the company to commence or prosecute business before the payment so authorized to be required, was made, still such implied authority but amounted to a license, subject to be revoked, except so far as acted upon, at any time, by the general assembly. *Id.*

119. —. The obligation of the contract, of each subscriber, was that he should pay for his stock. A mere expectation on his part that the law would not be enforced in requiring all the capital stock to be paid in, was not a vested right. It became the duty of the corporation to have payment made in to its treasury of its capital stock, and if the stockholders failed to exercise their controlling authority in requiring that duty to be performed, it was competent for the general assembly to impose a reasonable penalty, such as that prescribed in the act of 1869, for the non performance of that duty, although the duty may have been declared, and its performance enjoined, by the principles of the common law or the provisions of a prior statute. *Id.*

120. WHEN ENFORCED AT LAW. Under a general incorporation act, which provides that stockholders of a corporation shall be severally, individually, liable to creditors of the company, to the amount of unpaid stock held by them respectively, the stockholder is primarily liable to such creditors to the extent of his indebtedness for stock, and any creditor may maintain an action against the individual stockholder and recover the amount due on the stock held; *Smith et al. v. Londoner*, 6-302.

121. JURISDICTION OF EQUITY. A court of equity will, for the benefit of a creditor of an insolvent commercial corporation, compel a stockholder in such corporation to pay in the amount of capital stock, which he has contracted with the corporation to take; in other words, when a stockholder has contracted with the corporation to pay in a certain amount of the capital stock, he is bound by such contract and a court of equity will enforce it, for the benefit of creditors of the insolvent corporation; *Harmon v. Page et al.*, 9-29.

122. —. Neither the provisions of the constitution of California (art. 4, §§ 32, 36) of 1863, nor those of the constitution of 1869 (art. 12, §§ 2, 3), nor the civil code of the state (§ 322), oust a court of equity of its jurisdiction to compel the stockholders of commercial corporations to pay in, for the benefit of creditors, the amount of capital stock contracted for by them. *Id.*

123. —. In cases where many persons have claims and are prosecuting, or are about to prosecute them, at law against one defendant, or class of defendants, or a fund liable in equal degree to all those persons and to others, a court of equity, to forestall a multiplicity of actions, has jurisdiction of an action for a general accounting and adjustment of all the rights and to restrain separate and individual actions at law, in the same or other courts, thus bringing all the litigation into one suit; and, in this regard, it is immaterial whether the rights of action arise from general principles of law or from particular provisions of constitution or statute; *Pfohl v. Simpson et al.*, impleaded, 8-52.

124. —. The bringing into one such action, however, of all parties similarly situated, will not give a right or impose a liability which did not exist otherwise. *Id.*

125. INSTANCE. An action was held maintainable which was brought by a creditor of the Peoples Safe Deposit and Savings Institution, organized under Law of 1868 of New York (ch. 816), in his own behalf and that of other creditors, against the stockholders of said company, the assignee in bankruptcy and such creditors as had brought suits at law, to collect of such stockholders the sums for which they were liable under the provisions of said act (§§ 13, 14), to distribute the same among the creditors and to restrain the prosecution of said actions at law and the fact that, by the statute, the stockholders were made severally liable did not preclude the attaching and exercise of this equitable jurisdiction; but, the court, in such action, could only divide among all the creditors, having legal claims against one or more of the stockholders, the avails of the liabilities of those stockholders; it could not take from one creditor his right against a certain stockholder and give it, in whole or in part, to a creditor having no legal right against that stockholder. *Id.*

126. LIEN OF SUIT. Unless by statute it be otherwise provided, the institution of suit against a stockholder for a corporate debt

does not operate as a lien upon his limited liability, so as to hold him therefor against a senior judgment and execution obtained in an action commenced later; *State Savings Ass'n v. Kellogg*, 8-186.

127. **CONCURRENT JURISDICTION.** In enforcing the personal liability of a stockholder of a commercial corporation, for all debts and liabilities of the corporation contracted or incurred during the time he was a stockholder, in such proportion of all its debts contracted or incurred during the time he was a stockholder, as the amount or shares owned by him bears to the whole of the subscribed capital stock, or shares, of the corporation, the creditor has an election of remedy. At law it is constitutional or statutory; in the other case it is equitable; *Harmon v. Page et al.*, 9-29.

128. **PROCEEDING IN EQUITY.** A creditor of a corporation, having exhausted his remedy against the corporation, by judgment, execution and return of nulla bona, may proceed, by bill in equity, against stockholders to compel the payment of unpaid subscriptions to the capital stock; *Wetherbee v. Baker et al.*, 9-547.

129. **FORM OF ACTION.** A creditor of a manufacturing corporation, organized under the general manufacturing law of New York (Laws of 1848, ch. 40), in seeking to enforce the individual liability of stockholders, imposed upon them by that statute (§ 12) where the stock has not been paid in, has his election either to bring an action at law against a stockholder or to bring an action in equity, against all the stockholders, for an accounting between them and all the creditors; *Mathez v. Neidig*, 8-507.

130. **PLEADING; COMPLAINT.** In an action against stockholders, by a creditor, to recover upon their personal liability to the amount of stock held by them, it is not necessary to allege the manner of their acquisition of stock. It is sufficient to aver the fact they are stockholders, and the amount of stock they hold; *Overmyer v. Cannon*, 9-241.

131. **WHO MAY SUE.** The charter of a corporation, providing that "each stockholder shall be liable to double the amount of stock held, or owned by him," it gives a creditor of the corporation a right of action at law, in his own name, against any stockholder, for the recovery of the amount due him, and each stockholder is severally and individually liable; *McCarthy v. Lavasche*, 6-419.

132. **WHO PROCEEDED AGAINST.** The creditor of a corporation is not required to proceed against all the stockholders, for their pro rata shares; but, he may recover his entire claim against one; provided the amount of the debt to him does not exceed the stockholder's proportion of the entire indebtedness of the company; *Boyd & Son v. Hale et al.*, 6-354.

133. **NECESSARY PARTIES.** A statute concerning corporations provided, "where the whole capital stock of a corporation shall not

have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." In enforcing such liability the proceeding should be in equity and prosecuted for the benefit of all the creditors, and the corporation is a necessary party; *Wetherbee v. Baker et al.*, 9-547.

134. **DISABILITY CONSTRUED.** The charter of a bank providing that all the stockholders of the corporation shall be severally and individually liable to the depositors of the bank, to the amount of stock held by them, respectively, during six months after the sale and transfer of their stock, creates a several liability on the part of stockholders in favor of depositors only. There is no liability incurred to the bank, or to creditors other than depositors, and the remedy of the depositor, in such case, is in law; *Wincock v. Turpin*, 6-473.

135. **MEASURE OF.** Where, by constitution and statute, it is provided there shall be a liability of the stockholder for indebtedness of his corporation to the extent of an amount equal to the value of his stock, paid and unpaid — that is a double liability — the stockholder is not liable for the debts of the company in full, as in case of partnership; but, only to an amount equal to his stock together with any unpaid subscription; *State Sav. Ass'n v. Kellogg*, 8-186.

136. **EFFECT OF BANKRUPTCY.** It is no defense to a bill in equity, to enforce statutory liability of directors or stockholders of a corporation that, at the time of demand made on an execution issued on the judgment recovered in the original action and at the time of filing the bill, the corporation was in bankruptcy and its property in the hands of an assignee in bankruptcy; *First Nat. Bank v. Hingham Manuf. Co.*, 7-496.

137. **PROOF OF DEBT IN BANKRUPTCY.** It is no bar to a bill in equity against a corporation and its directors or stockholders, to enforce the personal liability of the latter, that the plaintiffs have proved their demands in bankruptcy against the corporation and received dividends thereon. *Id.*

138. **DISCHARGE IN BANKRUPTCY.** The discharge in bankruptcy, of a director or stockholder of a corporation under proceedings begun before an action is brought against the corporation, in which judgment is afterward obtained against it, is no defense to a bill in equity brought by such judgment creditor to enforce the personal liability of such director or stockholder for an excess of indebtedness of the corporation over the sum of its capital stock, or for the amount due for stock subscribed. The phrase "contingent liabilities" in the bankrupt law (U. S. Rev. Stat., § 5,068) can not be construed to include the possibility that, by

means of proceedings not yet instituted, the bankrupt may have enforced against him a liability created by statute, which can be enforced only by statutory method and which does not grow out of any contract on the part of the bankrupt with the person, or persons, for whose benefit the statute may be invoked. *Id.*

139. COMPOSITION IN BANKRUPTCY AND RELEASE. A director or stockholder of a corporation being liable as an indorser on the note of the corporation becoming bankrupt and, in proceedings for a composition, receiving a release from all liability as such indorser, can not urge that fact in defense to a bill in equity against him and other directors and stockholders to enforce their personal liability, as such, on the same note and other debts of the corporation. *Id.*

140. ANOTHER ACTION, NO DEFENSE. The fact that another creditor has filed a bill, in equity, in behalf of himself and all other creditors who may join etc. against the stockholders of a corporation which is in default of payment, in no manner affects the right of an individual creditor to maintain his act at law against an individual stockholder who is liable; *Garling v. Baechtel et al.*, 7-345.

141. —. It is no ground of objection to a bill in equity, filed under a statute authorizing a judgment, or other, creditor to file a bill in behalf of himself and all other creditors of a corporation, against a corporation and its directors, to enforce the personal liability of the latter, on the ground that the debts of the company exceeded the capital stock at a particular time, that the directors are, also, defendants to a bill in equity brought by the same plaintiffs against them as stockholders to enforce their individual liability on the ground that the capital stock of the corporation was not paid in. The same principle applies to a bill against stockholders sued as directors to enforce liability for an excess of indebtedness over the capital stock; *First Nat. Bank v. Hingham Manuf. Co.*, 7-496.

142. ESTOPPEL BY PAYMENT OF SUBSCRIPTION. The mere fact that a stockholder in a manufacturing company, pays his subscription, knowing that the whole capital stock of the corporation has not been subscribed for, and that the company is incurring debts for buildings and materials necessary in and about its business, is not such an act of participation as will estop him, when sued by a creditor of the corporation, from setting up as a defense, the partial subscription to the capital stock; *Garling v. Baechtel et al.*, 7-345.

143. ESTOPPEL BY PARTICIPATION IN IRREGULARITY. Where a stockholder, in a manufacturing corporation, made liable by statute to the creditors of the company to an amount equal to the amount of capital stock held by him, is sued, under the provisions of the statute for the recovery of a debt owing by the corporation, if he has participated in the affairs of the company, attended

meetings of stockholders, and knows the company is engaged in business, purchasing property and incurring liabilities, as well as that the capital stock has not been fully subscribed for and taken, he will be estopped, from pleading the partial subscription to the capital stock; but, in such case the debts must have been contracted on the faith of some act, or acts, or participation on his part. *Id.*

144. **BILL TO ENFORCE.** Under a statute which provides that a "judgment creditor, or any other creditor, may file a bill in equity in behalf of himself and all other creditors" of a corporation, to enforce the personal liability of the stockholders or directors of the corporation, the bill may be exhibited by two or more creditors in behalf of themselves and all other creditors; and, a prayer that the defendants be ordered "to pay to the plaintiffs and to such other creditors as may become parties to the bill" the amounts due to them is not repugnant to a bill so framed; *Nat. Bank v. Hingham Manuf. Co.*, 7-496.

145. —. A statute provides, of stockholders, they "shall be individually liable in an amount equal to double the amount of stock owned by them, for all debts of such bank, and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders" (*Gen. Stat., Minn., ch. 32, § 21*). The statute applies to stockholders in all banks organized under the chapter since the passage of an amendatory act of 1869 (*ch. 85*). The remedy to enforce the liability given is exclusive, and requires the creditor to file his complaint, in the district court (*Gen. Stat., ch. 76*), against all stockholders liable; *Allen v. Walsh*, 7-634.

146. **INSUFFICIENT BILL TO ENFORCE.** A bill in chancery, exhibited by the receiver of a banking corporation and a creditor, who claims as a depositor, to enjoin actions at law, by depositors, against stockholders, which fails to allege that such stockholders are liable for unpaid balances due on their stock, or under a clause in the charter of the company which renders them liable to depositors to the amount of shares of stock held by them, or that their liability was incurred in some other way, is too indefinite and vague to sustain a decree for relief against such stockholders; *Wincock et al. v. Turpin*, 9-473.

147. **ACTION BETWEEN PARTNERS.** A partnership firm, as a creditor of a corporation, can not maintain an action at law against a member of such firm to enforce his individual liability, as a stockholder, to the creditors of the corporation; since, he can not be both a plaintiff and defendant; *Buchanan v. Meisser*, 9-209.

148. **DEFENSE.** In an action to enforce a personal liability imposed by statute, for a default in making reports, the trustees sought to be charged can not avail themselves of a defense not personal to them, but going to the foundation of the claim and cause

of action against the corporation, which would not be available in its favor; and, where a valid debt exists against the corporation to which it has no good defense, legal or equitable, the trustees, if in default, are chargeable with its payment; *Whitney Arms Co. v. Barlow et al.*, §-425.

149. **RELEASE FROM, BY CORPORATION.** A statute (Missis. Code, 1871, § 2413) provides "that each stockholder shall be individually liable for the debts of the corporation, contracted during his ownership of stock, for the amount or balance that may remain due or unpaid for the stock so subscribed for by him, and may be sued by any creditor of the corporation, and such liability shall continue for one year after the sale or transfer of the stock." The liability of a stockholder to the extent of his unpaid subscriptions to a creditor of the corporation, is not discharged by a release executed by the corporation, when solvent, in consideration of a payment in excess of the calls and a surrender of one-half the subscribers' shares; *Vick v. La Rochelle*, §-63.

150. **EQUITABLE RELEASE OF.** A promissory note, signed with the name of a corporation by its treasurer and indorsed with its name by its directors was delivered to a person under a written agreement with him and the corporation, by which he sold property to the corporation, and the corporation was to give the note as the price, and, in pursuance of a contemporaneous oral agreement, made in a talk with the directors, "that there should be no personal liability on the note referred to" in the written agreement. He afterward recovered judgment on the note, in an action at law against the corporation. It was held, on a bill in equity, against the stockholders of the corporation, to enforce payment of the judgment, under statutory provisions (Stat. Mass., 1870, ch. 224, §§ 39 et seq.; 1875, ch. 177, § 1; and, 1876, ch. 1, § 1), that the oral agreement meant that there should be no statutory liability on the part of the stockholders, and that this agreement was admissible in defense, and was not merged in the judgment; *Brown v. Eastern Slate Co. et al.*, §-465.

151. **INSOLVENCY OF TRANSFEREE.** Where, before execution against a corporation, the stockholder honestly and without intention to defeat creditors of the company, sells and transfers his stock, the mere fact of the insolvency of the purchaser at the time of the transfer is not sufficient ground upon which to hold such stockholder liable for the corporate debts. The inquiry in such a case is whether the transfer was fraudulent and void as to creditors of the company. If the stockholder making the transfer had knowledge of his assignee's insolvency at the time of the assignment it would be very strong evidence of fraud, making it hard to resist the conclusion that the transfer was made in bad faith; *Miller et al. v. Great Republic Ins. Co. etc.*, §-82.

152. **STATUTE OF LIMITATIONS.** Where a trustee has become liable for a debt of his corporation, because of failure to make and

file an annual financial statement, the statute of limitations begins to run as to that and the right of action is barred, according to the terms of the statute, although the default is continued during succeeding years; the continuance of the default does not continue the liability or create a new one; *Losee et al., ex'rs etc., v. Bullard, impleaded etc.,* 8-603.

153. LIMITATION OF RIGHT OF ACTION AGAINST STOCKHOLDERS. The general manufacturing act of the state of New York (Laws of 1848, ch. 40), provided that stockholders, under special circumstances, shall be liable "to creditors of the company" for "debts and contracts of the company." A subsequent section of the statute defines the conditions of enforcing such liability; 1, that the debt must be payable within a year from the time it was contracted; 2, that suit against the company must have been brought within a year after the debt became due; 3, that execution against the company must have been returned unsatisfied; and, 4, that suits against persons who have ceased to be stockholders must be brought within two years thereafter. A creditor of a corporation organized under this law can not maintain an action against a stockholder to enforce the liability imposed until he has obtained a judgment upon his claim against the corporation and an execution has been issued and returned unsatisfied. Therefore, the statute of limitations does not commence to run in favor of a stockholder until after the return of execution against the corporation; *Handy v. Draper,* 9-633.

154. —. In such case the stockholder's liability is limited to the amount of his stock with interest from the time of the commencement of the action; wherefore, the allowance of interest from the date of the recovery of judgment against the corporation was error. *Id.*

155. ONUS PROBANDI. Where personal liability for the debts of a corporation is imposed upon trustees and stockholders, in case of non compliance with provisions of the statute under which the company is organized, it is incumbent on the plaintiff, in an action to enforce such liability, to establish that the provisions have not been complied with; *Chase v. Lord et al.,* 8-575.

156. NECESSARY FACTS TO ESTABLISH. Where one, who is a shareholder of a corporation, claims exemption under the provisions of a general incorporation law, he must show that the corporation, of which he is a member, has complied with all material, or mandatory, requirements of the law, authorizing the incorporation, and exemption. An attempt to become incorporated, although in good faith, and user of franchises, will not suffice to secure exemption and bar a personal action; *Kaiser v. Lawrence Savings Bk.,* 6-574.

157. SET OFF. In a proceeding in equity, a bona fide judgment debt, of a holder of stock of a corporation, may be set off against the claim to make him individually liable for the debts of

the corporation in proportion to his stock; *Boyd & Son v. Hale et al.*, 6-354.

158. JUDGMENT FRAUDULENT. A judgment offered to be set off, in a suit to recover from an individual stockholder his proportion of the indebtedness of the corporation, may be attacked for fraud; but, the pleadings must allege the facts of the fraud and the proof must establish these, in order to set such judgment aside. *Id.*

159. RIGHT TO SET OFF DEBT DUE FROM THE CORPORATION. In an action by a creditor of a corporation against a stockholder to enforce his individual liability to the amount of his stock, he can not plead, as a set off, an indebtedness of the corporation to himself; as such set off is not that of the party suing. Debts, to be set off at law, must be mutual and between the same parties; *Buchanan v. Meisser*, 9-209.

160. SET OFF. A defendant, in an action to recover an indebtedness of a corporation, on the ground that the capital stock had not been paid in, set up as an equitable off-set, an alleged indebtedness of the corporation to him. It was made to appear that the amount of his claim was less than the amount due upon his subscription for stock. It was adjudged that defendant was not entitled to the off-set claimed; that he was bound first to pay his own debt to the corporation and only in case there was a balance due him after such payment was he entitled to the allowance to the extent of that balance; that it was immaterial that his claim had not been actually applied on the subscription, as plaintiff had a right to insist that, equitably, it should be so applied when defendant stands upon an equitable right; *Wheeler v. Miller*, 9-647.

161. SET OFF IN EQUITY. A creditor of a corporation recovered a judgment at law against the corporation, upon which an execution was issued, and returned nulla bona. Thereupon the judgment creditor exhibited a creditor's bill against several persons as stockholders in the corporation, for the purpose of recovering their unpaid subscriptions in satisfaction of his debt. The corporation was, also, made a party. At the time of the bringing of the suit, in which the judgment was rendered, the corporation held a claim for damages against the plaintiff in that action, growing out of the same transaction as that involved in the suit at law, and of such character that it could have been interposed as a set off in that suit — but that was not done. The corporation, however, asked leave to file a cross bill in the suit in chancery, by which it sought to set off its claim as against the judgment held by the complainant in the original bill, who was alleged to be a non resident of the state. The trial court refused to permit the cross bill to be filed. This was held to be error. Although the claim of the corporation was a legal demand, and capable of being set off in the suit at law, the corporation was not bound to set it up as a defense in that suit. The judgment creditor having

invoked the aid of a court of equity to enforce the collection of his judgment, this claim of the corporation became a proper subject of set off in that suit, if there was equitable ground for such relief. The fact of the non residence of the complainant in the creditor's bill afforded such equitable ground; *Quick et al. v. Lemon*, 9-204.

162. CORPORATE BOOKS. In an action by a depositor, in a corporation having banking powers, against one of its stockholders, to enforce his personal liability, the bank ledger, although not a book of original entries, is competent testimony, as an admission of the company, on its own books, of the amount due the depositor; *Dows v. Naper*, 6-424.

163. —; TO SHOW ACCEPTANCE OF CHARTER AMENDMENT. The record or journal of the acts and proceedings of a corporation is admissible in evidence against a stockholder, in a suit to enforce his personal liability to a creditor of the corporation. It is competent evidence to show an acceptance of an amendment of the charter, without first showing that the persons accepting the same were directors, when they are named as such in the journal. *Id.*

164. EVIDENCE OF DEPOSIT. Where the charter of a corporation with banking powers provided that its officers, when required by any person making a deposit in the savings department of the company, shall issue certificates of deposit for the same, and made the stockholders personally responsible to depositors in such department, it is not essential to the liability of the stockholders that a certificate of deposit be given, but the amount and character of a deposit may be shown by any other competent evidence. It may be shown by the pass book given the depositor. *Id.*

165. EXTINGUISHMENT OF LIABILITY. The recovery of a judgment by a creditor of a corporation against a stockholder, for a sum equal to the amount of his stock, that being the limit of his liability for the corporation, will extinguish his liability. So, it is not doubted, will a voluntary payment, by him, to such a creditor of the corporation as has the right to sue him and recover judgment at law on his liability; *Buchanan v. Meisser*, 9-209.

166. —. A payment of a sum equal to his stock, however, to a firm of which he is a member, in satisfaction of a debt due from the corporation to his firm will not release him from his liability as a stockholder of such corporation, or bar a suit by another creditor; as the firm could not maintain an action at law against him. *Id.*

167. JUDGMENT CONCLUSIVE. There is room for contending in a case where the liability of the stockholder attaches, as an individual, that a judgment obtained without fraud, or collusion between the judgment creditor and the corporation, is conclusive and binding on the stockholder, as to the fact and extent of the company's liability; but, the questions whether the cause of action

adjudicated was of a nature to involve the stockholder under the statute, and whether the conditions as to ownership of stock existed are to be considered open ; *Bohn v. Brown*, 6-582.

168. EXECUTION AGAINST STOCKHOLDERS ; WHEN. Where an action is brought, in Kansas, against an incorporated bank, to recover money due upon a certificate of deposit, issued by it to the plaintiff, and certain stockholders of the corporation are, also, made parties defendant and the petition fails to show that the bank is dissolved, or that primarily there is any liability against the stockholders, within the terms of the statute, no judgment can be rendered in the first instance against the stockholders. After judgment is obtained against the corporation, if the execution issued thereon against its property be returned nulla bona, then execution may issue against any of the stockholders, to an extent equal in amount to the amount of stock owned by him or her, in accordance with the terms of Comp. L., 1879, ch. 23, art. 4, § 32 ; *Valley Bank & Savings Inst. v. Ladies Congregational Sewing So.*, 9-331.

169. EXECUTION ; WHEN LIABILITY FIXED. A statute (Wag. Stat., 291, § 13) provides, "if any execution shall have been issued against the property or effects of a corporation, and if there can not be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him, or her, owned, together with any amount unpaid thereon ; provided, always, that no execution shall issue against any stockholder except upon an order from the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice, in writing, to the person to be charged ; and, upon such motion, such court may order execution to issue accordingly." The liability of the stockholders is measured by the number of shares held by him at the return of the execution, and not by the number which he held when the motion was filed ; *Skrainka et al. v. Allen*, 9-522.

170. PARTNERSHIP. Where a partnership owns stock in an insolvent corporation a member of the firm will be liable, to an execution against him individually, as a stockholder, upon a motion of a creditor of the corporation, in all cases where the firm would be subject to such liability ; *Bray's adm'r v. Seligman's adm'r*, 9-507.

171. APPORTIONMENT. Where a joint action may be and is instituted against stockholders of an insolvent corporation, to recover of them the sums by them due upon subscriptions to stock, it is not error to award a judgment for the entire sum of the debt against all, to be discharged upon the payment of specified sums apportioned among the stockholders, as they are bound to pay under the statute ; *Overmyer et al. v. Cannon*, 9-241.

172. CONTRIBUTION. Where a stockholder of a corporation becomes liable under its charter for all debts of the corporation, and he has been sued, recovered against, and paid the amount of the recovery, he is entitled to contribution from the other stockholders, who are liable under the same law and he may enforce this right in equity; *Wincock et al. v. Turpin*, 6-473.

173. ——. A statute which provides for contribution, in the event any stockholder is compelled to pay the debt of any creditor, giving a right of joint or several action and recovery of the ratable amount due from the one or more persons so sued (Comp. L., section stated in the opinion) does not contemplate a joint judgment, by which one party defendant would be charged, not only for his own delinquency, but, for the delinquency of others. The words of a statute should be very plain before it should be held to authorize a joint judgment on promises which were several; *Bagley v. Beecher*, 6-595.

174. ——. A statute provided that all stockholders of a corporation shall be severally and individually liable to the creditors of the corporation of which they are stockholders to an amount equal to any unpaid subscription to stock, held by them respectively. If any one stockholder is required, under such statute, to pay a debt due by the corporation, he is entitled to contribution from all the other stockholders whose subscriptions are unpaid; *Weber v. Fickey, jr., use of etc.*, 7-385.

175. ——. In such case if a stockholder shall not have paid up his subscription but shall claim to be a creditor of the corporation of which he is a stockholder, his unpaid stock is liable for the debt and he can not recover from any other stockholder to the full extent of his claim. *Id.*

176. ——. Where the stockholders of a corporation are individually liable for its debts and a bill is filed by one creditor, in behalf of all the creditors, against one of the stockholders, the court should ascertain the whole of the indebtedness of the company and render a decree for the payment of all of it; and, it may be collected from the solvent stockholders, or stockholder. In settling the equities between the stockholders, however, each should be made to contribute in proportion to the amount of his stock; and, if the complainant himself be a stockholder, he should be made to contribute his share of his own debt and to all other debts which may be established; *Perkins v. Sanders et al.*, 8-53.

177. ——. Plaintiffs and other stockholders in an insolvent corporation, supposing themselves to be personally liable for the payment of the corporate indebtedness, joined in an agreement with defendants, who were stockholders in the same company, by which it was stipulated that defendants, for the benefit of all the parties to the agreement, should negotiate for the purchase of the corporate debts, effect a purchase of them, paying therefor less than their nominal amounts and, subsequently, collect them of the

corporation, and receive out of the corporate funds, a sum more than sufficient to pay all their disbursements and expenses. Defendants, in such case, can not recover of plaintiffs a sum in excess of the cost of obtaining a discharge of plaintiffs' personal liability; and, in equity, all the cost having been paid by the money of the corporation, received by the defendants, they have no valid claim against the plaintiffs for indemnity or contribution; *Sinclair et al. v. Redington et al.*, 8-387.

178. CONTRIBUTION. A stockholder of a corporation who pays the amount of his individual liability to a firm of which he is a partner, for a debt due such firm from the corporation, thereby acquires an equitable right against his co-stockholders, recognizable and enforceable only in equity; *Buchanan v. Meisser*, 9-209.

See CREDITOR'S BILL; DIRECTORS; DISSOLUTION; ESTOPPEL; OFFICES AND OFFICERS; ORGANIZATION; PARTNERSHIP; PENALTY; STOCK AND STOCKHOLDERS (148-197).

PLANK ROAD COMPANY.

1. PUBLIC HIGHWAYS. Plank roads constructed by private corporations, are public highways, especially when constructed upon the right of way of public highways, and travelers have the same right to use them as other public highways, upon the payment of the tolls authorized to be collected; *Craig v. People, ex rel. Nevill*, 3-240.

2. CLOSING SAME. A plank road constructed over a portion of a public highway, which highway was closed to divert travel to the plank road, can not be closed against the public. *Id.*

3. ABANDONMENT. When a plank road company forfeits its charter, or abandons or suffers the road to become so out of repair as to amount to an abandonment, the franchise ceases and the road becomes a common highway. *Id.*

4. ABANDONMENT OF CHARTER. When the lessees or assignees of a plank road company published a notice, that owing to the bad condition of the road, the high price of labor and materials, they could not profitably keep up the road at the prescribed tolls, and that unless the county would buy their entire interest in the roadway, bridges, plank, toll gates, etc. the road would be closed up as private property, it was held the notice was in effect an abandonment of the franchise. *Id.*

PLEADINGS.

1. CAPACITY TO SUE. The question of the want of capacity of plaintiff to sue can not be raised under a demurrer, to the complaint, for its failure to state sufficient facts to constitute a cause of action; *Rogers et al. v. Lafayette Agric. Works et al.*, 7-67.

2. —. To sustain a demurrer upon the ground that it appears from the face of the complaint "that the plaintiff has not legal capacity to sue," it is not enough that it does not appear

that the plaintiff has legal capacity to sue; but, the want of such legal capacity must appear affirmatively; *Minneapolis Harvester W. v. Libby*, 7-621.

3. CORPORATE EXISTENCE. Corporate existence is admitted by a complaint against a party named as a corporation. If it be claimed there is no lawful corporation the individuals usurping corporate rights should be brought in to court; *State of Iowa v. Indep. School Dist.*, 6-522.

4. —. Upon an unconditional promise to pay a corporation a certain sum of money, either as an ordinary debt or as a subscription to its capital stock, it is unnecessary to aver that the requisite amount of capital stock has been subscribed as provided by the charter, in order to present a good cause of action; *Lail v. Mount Sterling C. R. Co.*, 7-172.

5. —. A demurrer questioning the sufficiency of a complaint by a plaintiff, styled "The trustees of" a "church" named, does not question, but admits the corporate existence and plaintiff's capacity to sue; *Wiles v. Trustees*, 7-85.

6. —. A plea of general denial does not put in issue corporate existence and capacity to sue. Such plea, or answer, simply denies the cause of action. *Id.*

7. —. In a suit instituted by a corporation, an averment that plaintiff was a corporation, duly incorporated under and by virtue of an act of the general assembly of the state of Missouri, entitled etc., sufficiently alleges plaintiff's corporate existence; *Chillicothe Saving Ass'n v. Rueger et al.*, 8-140.

8. —. It is not necessary to allege, in complaint, that a corporation is such other than by the statement of its name. No more certainty is required, in the complaint, as to the corporate character of the company, than if the company had brought the action; and, in that case, at common law, no specific allegation of incorporation would be important. The name of the company implies its corporate existence; *Odd Fellows Building Ass'n v. Hogan*, 4-278.

9. —. It is incumbent on the part of the defendant, sued as a corporation, to raise objection as to its corporate capacity, by plea, in abatement or otherwise, to entitle it to avail itself of the omission or defect of proof in respect to the corporate capacity. *Id.*

10. ORGANIZATION. In a complaint filed by a corporation, the pleader is not required to set forth every fact necessary to a complete organization; nor is he required to anticipate supposed defenses growing out of irregularities occurring in, or after, the election of directors; *Washer v. Allensville etc. Turnpike Co.*, 9-223.

11. —. In an action by a company the complaint alleged the due incorporation thereof. Every material allegation of the petition, including the execution of the instrument sued on, was denied by an answer under oath. Held, that an omission to

establish this allegation was fatal to a recovery; *Chance v. Indianapolis etc. G. R. Co.*, 1-385.

12. **ALLEGATION OF CORPORATE EXISTENCE.** In an action against the "Neal Manufacturing Company," the complaint averred that the defendants were the directors and sole stockholders of said company; "that said Neal Manufacturing Company was organized April 10, 1866, by articles of association filed and recorded in the Jefferson county recorder's office on said day, a copy of which articles of association is filed herewith as part hereof; and said company carried on said business at said Madison." It was held, that the corporate existence was sufficiently alleged; *Traber et al. v. Brown et al.*, 1-366.

13. **ALLEGATION OF OMISSION TO FILE FOR RECORD.** An information in the nature of a quo warranto alleged that the company did not file a copy of its articles of association "with the recorder of" the county in which etc. It was held, not a reasonably certain averment that the articles were not filed in the recorder's office; *State, ex rel. O'Brien, v. Bethlehem etc. G. R. Co.*, 1-375.

14. **STATUTE.** When the statute of another state constitutes a part of the organization of a corporation suing in the state of Indiana, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded; *Paine et al. v. Lake Erie & Louisville R.R. Co.*, 1-386.

15. —. It is not necessary to plead a public law, and in this respect there is no difference between a public law, so called, and one declared to be such by the legislature; *People v. Ottawa Hydr. Co.*, 10-279.

16. **POWER TO CONTRACT.** An allegation, in a complaint, that "plaintiff [a corporation] and defendant entered into an agreement to and with each other" etc., includes and implies plaintiff's capacity and power to make the agreement; *La Grange Mill Co. v. Bennewitz*, 8-5.

17. —. In action by a corporation, obligee in a bond of indemnity executed by and for an agent, to recover the principal obligor's note and his debt of one dollar, a plea by sureties on such bond, that the plaintiff has not power to make the contract sued on — if allowable at all — must state which contract is sought to be impugned and wherein it is ultra vires; *Cox et al. v. Weed S. Mach. Co.*, 8-59.

18. **DENIAL OF EXISTENCE.** In an action by a corporation, a denial, in the answer, of knowledge or information sufficient to form a belief as to whether plaintiff is a corporation, will not impose upon plaintiff the necessity of proving, on the trial, its corporate existence; *First Nat'l Bank v. Loyhed*, 8-11.

19. **DENIAL OF CORPORATE RIGHTS.** A general denial, or plea of the general issue, does not put in issue the corporate existence of a corporate plaintiff, nor its right to sue. That could only be

done by demurrer or by special denial, in the nature of a plea in abatement; *National Life Ins. Co. v. Robinson*, 8-325.

20. **DISSOLUTION.** In a suit on a promissory note executed to a corporation, brought by the payee against the maker, the fact that the corporation has ceased to exist since the execution of the note, may be pleaded in abatement, not in bar. Such plea must show that the corporation had come to an end by some legal process. Facts upon which dissolution or the forfeiture of its franchises might be declared can not be tried collaterally in such suit; *President etc. of Hartsv. Univ. v. Hamilton*, 3-295.

21. **NUL TIEL CORPORATION.** In an action upon an unconditional promise to pay money to a corporation, the undertaking admits corporate existence and organization. If the corporation has ceased to exist, or the company never was incorporated, the defense can not be raised on demurrer, but to be available, must be made by appropriate pleading; *Lail v. Mount Sterling C. R. Co.*, 7-172.

22. —. The plea of nul tiel corporation is a proper plea, in a suit by a corporate body, when it is denied there is any such body; but, under that plea it is sufficient for the corporation to prove that it is known and transacts business under the corporate name in which the suit is assumed to be brought, or is a corporation de facto. It is not necessary under such plea in such suit to show that the plaintiff is a corporation de jure, as in case of a quo warranto; *Osborne v. People, ex rel.*, 9-153.

23. **CITIZENSHIP.** An averment that a corporation is created by the statute of one state, and is located in another and doing business therein under its laws, does not allege that it is a citizen of the latter state; *Germania Fire Ins. Co. v. Francis*, 3-60.

24. —. It is necessary in a proceeding by or against a corporation, in the federal courts, that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen; *Muller v. Dows*, 6-8.

25. —. While in a bill, formally drafted, the averment of citizenship of a corporation should, always, be made in the introduction or in the stating part of the bill, the bill will not be dismissed if it be made any where in the pleadings. *Id.*

26. **ABATEMENT.** A plea in abatement by a corporation aggregate must purport to be by their attorney. A plea which says that the company, "by its president and secretary, comes and says," etc., is defective, and obnoxious to a demurrer; *Nixon, Ellison & Co. v. S. W. Ins. Co.*, 1-418.

27. —. A plea in bar waives all pleas, and the right to plead, in abatement; *R.R. Co. v. Harris*, 3-83.

28. **ANOTHER ACTION PENDING; JOINDER OF NEW PARTY.** It is not a sufficient answer to a plea of another action pending in a court of competent jurisdiction, that the case at bar involves an additional

issue and an additional party. The issue joined in the action pending will remain in, and be decided by, the court in which the original action is; *City of Memphis v. Dean*, **3-1**.

29. **ASSESSMENTS OF STOCK.** In an action on a contract of subscription to stock of a corporation, containing a condition precedent — in this case that a certain amount of capital stock shall be subscribed for — the plaintiff must aver performance to show a cause of action against the subscriber, defendant; or he must aver all the facts necessary to show a waiver of the condition precedent and to fix defendant's liability notwithstanding the non performance; *Livesey v. Omaha Hotel Co.*, **8-312**.

30. **ASSESSMENT.** In an action by a draining association to enforce payment of an assessment, the complaint need not state, in terms, the use for which the money is required, if it appears from the whole complaint that it is for the construction of the drain referred to in the directors' order of payment set out in the complaint; *Large v. Keen's Creek Drain. Co.*, **1-358**.

31. **DESCRIPTION OF DRAIN.** In an action on an assessment against a defendant who is not a member of the association the complaint must describe the commencement, course and terminus of the drain. *Id.*

32. **CARRIER.** Though the declaration does not allege that the defendants are common carriers, yet if the facts set out constitute them such in law, it is sufficient to sustain an action against them as common carriers; *South. Exp. Co. v. M'Veigh*, **4-207**.

33. **FALSE REPRESENTATIONS.** False representations, upon which fraud can be predicated, urged in defense against a promissory note, must be of existing facts, or facts alleged to exist at the time, and not of promises to be performed in the future, or the legal construction or effect of a written instrument executed at the time of the making of the representations; *President etc. of Hartsville Univ. v. Hamilton*, **3-295**.

34. **FORFEITURE.** Where a number of individuals assume to act as a corporation an information concerning a general denial of their right to do so will be sufficient to put them to their plea of justification, but if the information attempts to set out their title, as was done here, and the facts shown for that purpose when taken in connection with other facts appearing upon the face of the statutes make the title good, the information will be bad on demurrer; *People v. Ottawa Hydraulic Co.*, **10-279**.

35. —. A pleading which sets up an abandonment and forfeiture of a corporate purpose — in this case a railroad — for failure to perform the actions mentioned in section 3980 of the revised statutes of Indiana, of 1881, but which does not allege that the forfeiture had been judicially declared in a suit for that purpose, at the instance of the state, by information on the relation of the prosecuting attorney (§§ 1131-2, Rev. Stat., 1881) is bad. A cause of forfeiture, not judicially declared, in a direct

proceeding, can not be taken advantage of collaterally ; *Logan v. Vernon etc. R.R. Co. et al.*, 9-304.

36. JUDGMENT. Complaint in action not expressly averring that a judgment was fraudulent in fact or that the officers of the company colluded with plaintiff therein, but, averring facts which, if proved, authorized the inference that the judgment was without consideration and fraudulently and conclusively obtained. Sufficient after judgment ; *Whittlesey, rec'r, v. Delaney*, 8-528.

37. LIBEL. In an action by a foreign corporation, for an alleged libel, on demurrer to the declaration, it was held, that the charter of the plaintiff should be set out at length, in order that it might be seen whether the publication was false in stating the mode in which it authorized the business of the company to be done, and which was the subject of the criticism which constituted the alleged libel ; *Hahnemannian Life Ins. Co. v. Beebe*, 1-420.

38. —. Nor could the charter be treated as properly pleaded, when only brought before the court as a part of the alleged libelous publication. *Id.*

39. —. Neither would the usual formula, to the effect that the defendant falsely and maliciously wrote, published etc. be sufficient in a case of this character ; it is sufficient in an action by a natural person, for words actionable in themselves, because the law presumes such person to be of good credit and character until the contrary is made to appear. But, it can not be presumed that the legislature of a foreign state has not granted an unwise charter to a corporation. *Id.*

40. MONEY ORDER. A declaration, against a corporation, founded on an order alleged to have been accepted by its treasurer should aver his power to accept such order on behalf of the corporation ; *Trustees of Prairie Lodge v. Smith*, 8-66.

41. NUISANCE. An allegation in a declaration, in substance, that the defendants have unlawfully, injuriously etc. built a railroad bridge or viaduct over navigable waters, whereby their navigability is impaired and diminished, so as to cause special damage, specified in an action on the case against a railroad company, authorized by legislative enactment to build such a structure, discloses no cause of action and is obnoxious to demurrer ; *Stephens & Condit Transp. Co. v. Central R.R. Co. of New Jersey*, 3-558.

42. RATIFICATION. A bill in equity was exhibited praying for relief against the board of directors of a corporation, for their action in increasing the capital stock thereof, without authority of law, or the consent of complaining stockholders. The answer averred that if the directors had no power, the shareholders had ratified the act. The allegation was unaccompanied with any of the facts as to the time, manner or circumstances under which the ratification was claimed to have been made. Such an averment is insufficient ; *Eidman et al. v. Bowman et al.*, 4-347.

43. **STATUTE OF LIMITATIONS.** Defendant can not avail himself of limitations by demurrer to complaint, unless it affirmatively appears, on its face, that the action is barred by some provision of statute; *Harmon v. Page et al.*, 9-29.

44. **STOCKHOLDERS AGAINST TRUSTEES.** In an action brought by stockholders of a corporation against its trustees, the averment they are "the duly elected trustees of said corporation" is equivalent to an averment that they are the only trustees; *Parrott et al. v. Byers et al.*, 4-282.

45. —. Where the relations between parties are such that a demand and refusal is a condition precedent to the right of the plaintiff to maintain the action, a denial, in the answer, of the relation on which the action is founded, will dispense with the necessity of an averment, in the complaint, of a previous demand and refusal. *Id.*

46. **SUIT BY STOCKHOLDER.** Where a suit is instituted by a stockholder of a corporation, which involves some right of the body corporate, the failure to make the corporation a party is not a mere defect of parties, to be taken advantage of by special demurrer; but, the stockholder is left without cause of action, the party entitled to relief not being before the court. In such case the court should not require the corporation to be brought in, but, the proceedings should be dismissed absolutely; *Shawhan et. v. Zinn et.*, 7-186.

47. —. Where a stockholder of a corporation is a creditor thereof and seeks to recover his debt from another stockholder who has not paid up his subscription, the plaintiff must aver and prove that he has paid up his whole subscription to the stock and, also, that the defendant was a stockholder of the corporation at the time the debt was contracted and that he has not paid up his subscription; *Weber v. Fickey, jr., use of et.*, 7-385.

48. **SUBSCRIPTION BEFORE ORGANIZATION.** When a suit is brought to recover on a subscription to stock made on original articles of association, signed preliminary to incorporation, it is essential that the company suing shall aver in its complaint and prove on the hearing, that it has become lawfully incorporated. In such case defendant is not estopped from denying the legality of incorporation; *Nelson v. Blakey, ass'e*, 7-23.

49. —. Subscription for stock made, before the organization of the company. It is necessary to a recovery at law thereon that it shall appear that the subsequent steps, essential to bring the corporation into existence, were taken; *Reed v. Richmond S. Ry. Co.*, 7-49.

50. **STOCK SUBSCRIBED FOR.** In an action to recover the value of stock subscribed for, it is not necessary to aver a tender of certificates of shares, in the absence of stipulation made, on subscription, to the contrary; *Miller v. Wild Cat G. R. Co.*, 7-58.

51. —. If a subscription, to pay money, in aid of a college

is made to a committee and passes by operation of law to a corporation afterward formed, the complaint, in an action to recover the subscription, should aver that fact; *Christian Coll. v. Hendley*, **5-151**.

52. STOCK SUBSCRIBED FOR. In an action upon the original subscription it is not necessary to aver calls or assessments, at least after the lapse of time within which the organic act requires the whole capital to be paid in; *Phoenix Warehouse Co. v. Badger*, **5-588**.

53. FRAUD IN OBTAINING SUBSCRIPTION. Suit being brought to recover upon a subscription for stock in a corporation, defendant pleaded specially, that "the company fraudulently obtained the signature of the defendant to the subscription for stock in said company, by fraudulent representations, and that said company got fraudulent possession of the said subscription of the said defendant, and that said company knowingly committed said fraudulent acts." Plea held bad, it failing to aver the facts constituting the fraud; *Cole v. Joliet Opera House Co.*, **6-357**.

54. DECEIT IN SALE OF STOCK. A count in tort in the sale of stock of a corporation may be joined with a count in contract to recover back the price paid; *Teague v. Irwin*, **9-461**.

55. BILL NOT DEMURRABLE. A bill filed against two persons, charging them as stockholders in a corporation organized to contract for and build and construct railroads, which alleges, as to stockholders not made parties, that one is dead and the others are non residents of the state and charges an indebtedness for wood sold and delivered to the corporation, which has been dissolved, is not demurrable for uncertainty in not averring power to contract and the court can not say the contract is ultra vires the corporation; *Spence v. Shapard et al.*, **6-118**.

56. COMPLAINT. The complaint, in this case, states that the Minneapolis Harvester Company is a corporation organized under the general laws of this state; that after its organization defendant made, signed and delivered to it an agreement in writing, whereby he agreed to take ten shares of its capital stock and to pay \$500 for the same in four equal instalments, and that the Minneapolis Harvester Company, for value, transferred the agreement to plaintiff and that by the terms of the same the first three instalments have become due and payable. Held, (1) that the complaint is insufficient; because, it does not show that the Minneapolis Harvester Company is authorized to have a capital stock, or to take subscriptions to the same; (2) it is, further, insufficient in failing to allege that the Minneapolis Harvester Company transferred its obligation to deliver the stock, as well as the defendant's agreement to pay the same; (3) but, the complaint is not insufficient for not alleging the issuance and delivery, or tender, of the shares of stock mentioned; *Minneapolis Harvester Works v. Libby*, **7-621**.

57. **RECEIVER AGAINST MAKER OF STOCK NOTES.** Where suit is brought for the use of a receiver of an insolvent corporation, against a stockholder, to enforce payment of his subscription, or a note given therefor, no recovery can be had without an averment of the amount of the debts of the corporation. The receiver can recover no more than is sufficient to discharge the debts and liabilities of the corporation. The declaration should also show that the capital stock paid in has been exhausted; *Lamar Ins. Co. v. Moore*, 6-390.

58. **DISABILITY OF DIRECTOR.** When a stockholder is sued, as such, and he defends on claims against the corporation, purchased by him, his disability as a director to purchase at a discount may be urged, by plaintiff, without allegation to that effect in the pleadings; *Holland v. Heyman*, 7-10.

59. **STOCK NOT PAID FOR.** In an action to charge a stockholder with an indebtedness of the corporation, on the ground the capital stock has not been fully paid in, it is not necessary that defendant's indebtedness to the corporation should be pleaded. It is not required of plaintiff to anticipate the defense; *Wheeler v. Millar*, 9-649.

60. **TRANSFER OF STOCK.** Plaintiff's complaint alleged, in substance, that defendant issued a written instrument, as follows: This certifies that the bearer, Charles Foster, is entitled to ten shares of the capital stock of the Bushwick Railroad Company, upon surrender of this certificate at the company's office, \$1,000, which was duly delivered to Foster; that the same came into the possession of plaintiff by purchase for value and he is now the lawful owner and holder thereof; that defendant, on presentation of the certificate, refused to deliver said stock; and, judgment was asked compelling a delivery and that defendant pay interest on the value of the same, to wit, \$1,000, or, in case of failure to deliver, judgment for \$1,000 with interest. On demurrer to the complaint, it was adjudged that it did not state a cause of action; that the complaint contained no sufficient averments to establish a cause of action for \$1,000, or the interest thereon, as there is no averment that the shares are of any value, or that any duty or obligation rests on the defendant to pay interest; and, no cause of action was stated to compel the delivery of shares of stock; for that, 1, construing the complaint rigidly it asked for the delivery of shares, which it was not in the power of defendant to do; 2, construing the instrument as an evidence of the right of Foster to ten shares of stock, the allegation of ownership as an averment of a valid assignment to plaintiff and the prayer of the complaint as calling for the issue and delivery to plaintiff of a certificate, no facts were alleged showing an unjust refusal. If the corporation had no rules requiring evidence of the assignment and authority to make transfers upon its books, the act of the former owner, by which plaintiff became the lawful owner and holder, was all that

was required to entitle him to the shares and he could not compel an extraordinary act on the part of the defendant. If the defendant had duly prescribed rules for transfer before it will recognize the rights of assignees and give them evidence thereof, plaintiff has not averred them, nor has he alleged the presentation to defendant of any evidence of an assignment to him, or of authority to make a transfer, so that defendant was put in default; *Burrall v. Bushwick R.R. Co.*, 8-554.

61. **FRAUDULENT TRANSFER.** In a bill charging a transfer of stock under a forged power and seeking a re-placement of the certificates, want of authority to execute the power is sufficiently alleged by an averment that the certificates were purloined or stolen, by a certain person, as complainant believes, and afterward used by such person without complainant's knowledge or consent; *Blaisdell et al. v. Bohr et al.*, 9-64.

62. — In such bill all persons who are directly or consequentially interested in the event of the suit are properly made parties. *Id.*

63. — In such bill it was not error to order the person who fraudulently sold the stock to be made a party. *Id.*

64. **DEPARTURE.** In an action against a corporation for refusing to transfer stock upon its books, the petition alleging that plaintiff owns the stock and the reply setting up a special ownership as a pledgee, there is no departure; *Merchants Nat. Bank v. Richards*, 8-282.

65. **MISJOINDER OF COUNTS.** If the first count of a declaration be in case for a tort and other counts be joined which are not in tort, the declaration is clearly bad, upon demurrer, for misjoinder; *South. Exp. Co. v. M'Veigh*, 4-207.

66. **MISNOMER.** A corporation, defendant, can not take advantage of a misnomer in arrest of judgment, but must plead it in abatement; *East Tenn. & Ga. R.R. Co. v. Evans*, 4-186.

67. — The statutes incorporating the city of San Jose are entitled acts to incorporate "the city of San Jose;" describe the territory as "now called the city of San Jose," or further declare "that it shall be henceforth known as the city of San Jose;" they, also, provide for a city government under the name and style of the "Mayor and Common Council of the city of San Jose." Held, that an indictment charging the defendant with the embezzlement of the moneys of the city of San Jose, a municipal corporation under and by virtue of certain statutes, citing those above mentioned, did not correctly state the name of the owner; but that the error in name was immaterial under the provision of the statute providing that, when the offense charged in the indictment is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be material; *People v. Potter*, 2-66.

68. OFFICER, NAME OF. It was also averred that the defendant was, at the time the act charged was committed, the "city marshal." Held, that it sufficiently appeared that he was at the time an officer of the corporation. *Id.*

69. VARIANCE. The declaration averred the contract sued on to have been made with the Insurance Company of North America, and the proof showed that it was made with the president and directors of the company. Held, that the legal effect of the contract was alleged; *Ins. Co. v. M'Dowell and Brown*, 1-438.

70. —. If the complaint alleges a promise to pay money to a corporation and the promise proved was to a committee, there is a fatal variance between the complaint and proof; *Christian College v. Hendley*, 5-151.

71. —. Where a note sued upon is described as executed by defendant corporation and the note produced in evidence is subscribed by it and another, there is no variance; it is still the note of the company; *Rock Valley Paper Co. v. Nixon et al.*, 6-392.

72. —. A declaration, in a suit to recover the amount of a subscription to stock, alleged that the defendant "subscribed for, and agreed to take, five shares of the stock of the" corporation "and to pay \$400 therefor, in weekly instalments of one dollar per share in each and every week." The contract offered in evidence was that defendant "agreed to take five shares of stock and pay \$400 per share therefor in weekly instalments." In this case the non payment of the instalments was the gravamen of the complaint and there was no substantial variance between the narr. and the contract; *Frank v. Morrison et al.*, rec'rs, 9-390.

73. —. A declaration alleged that defendant agreed to pay plaintiff a certain sum, in consideration that plaintiff would assent to the election of a certain person as manager, in the defendant's place, of a corporation of which plaintiff and defendant were members. The evidence introduced at the trial showed that the consideration of the defendant's promise was that the plaintiff would vote for the person named as manager, and would, also, vote to increase the salaries of the officers of the corporation. It was held that there was a variance between the declaration and proof, in regard to the consideration; *Woodruff v. Wentworth*, 9-432.

74. ABBREVIATIONS. Where abbreviations, or initials of words, are used in pleadings, if, when taken in connection with the remainder of the pleading and subject matter, they can be clearly understood and not be ambiguous, the same effect will be given to them as if the words were written in full; *Odd Fellows Building Assoc. v. Hogan*, 4-278.

75. DEFECTIVE DECLARATION. A defective declaration may be cured by additional averments in a replication admitted by demurrer to be true; *R.R. Co. v. Harris*, 3-83.

76. **BILL OF PARTICULARS.** In an action against a stockholder of a corporation who has not paid up his subscription, to recover a debt due by the corporation, wherein the plaintiff declares on a judgment recovered against the corporation as his cause of action, the defendant is entitled to a bill of particulars, in order that he may be informed whether the debt due by the corporation was contracted at the time defendant was a stockholder; *Weber v. Fickey, jr. etc.*, 7-385.

77. **DEMURRER.** The principle of pleading that a demurrer, after several pleadings, reaches back to a defective declaration, does not apply where the defect is one of form and not of substance; *R.R. Co. v. Harris*, 3-83.

78. —. A bill to enforce a contract for the re-payment of money loaned to a corporation, which does not set out the purposes for which the corporation was created, is not demurrable upon ground of its failure to show affirmatively that such corporate defendant had capacity to contract. Prima facie its contracts are valid and the burden of showing invalidity is upon him who seeks to impeach the act; *Ala. Gold Life Ins. Co. v. Central Agric. & Mech. Ass'n*, 6-108.

79. **AMENDMENT.** The refusal of a referee, in an action to recover an unpaid balance of subscription for stock, to allow an amendment, of the answer, setting up that the signature of another apparent subscriber was not genuine and that defendant was misled thereby, is not the proper subject of exception. If the referee has power to allow the amendment, it is matter of discretion; *Phoenix Warehousing Co. v. Badger*, 8-476.

80. **MULTIFARIOUSNESS.** A bill is not multifarious because all the defendants named are not interested in all the matters contained in the bill. It is sufficient if each party had an interest in some matter in the suit which is common to all and that they are connected with the others; *Blaisdell et al. v. Bohr et al.*, 9-64.

81. **MOTION TO DISSOLVE INJUNCTION.** A bill in equity being exhibited, injunction issued, defendants answered and moved to dissolve on the ground, among others, that there were not proper parties to the bill. Held, that as this ground of motion, to dissolve, is in the nature of a general demurrer, to be good, it should show there are no proper parties to the bill; *Central R.R. Co. et al. v. Collins et al.*, 3-224.

82. **PROOF.** Where there are several paragraphs of answer, some in confession and others in denial, plaintiff can not treat those in confession as dispensing with the proof of facts put in issue by the paragraphs in denial; *Smelser v. Wayne & Union Straight Line Turnpike Co.*, 9-238.

83. **NOT AID DEFECTIVE ARTICLES.** If the articles of incorporation of an association be defective, in not setting forth a material fact, required by law to be stated, they will not be aided by an

answer on quo warranto, nor can proof be admitted to establish the fact; *People, ex rel., v. Segbridge et al.*, 6-242.

See ACTION; ASSESSMENT; BANKRUPTCY; CORPORATE EXISTENCE; EQUITY; FORFEITURE; MANDAMUS; MISNOMER; QUO WARRANTO; RECEIVER.

PLEDGE.

1. ESSENTIALS OF. A delivery to pledgee of the thing pledged is essential to the contract and until delivery the special property, that pledgee is entitled to hold, does not vest in him. Incorporeal property — stocks in a corporate company — can not be pledged without a written transfer of the title, unless it is expressly made assignable by delivery of the certificates; *State, ex rel. Koons, v. National Bank et al.*, 9-293.

2. POSSESSION OF CERTIFICATE. The title and ownership of stock in a national bank can pass only by a transfer of the stock on the books of the corporation; hence, a mere possession of a certificate of stock, in such a bank, is not such a possession as to constitute the holder a pledgee; he has, at most, a mere equity: *Koons v. Nat. Bank et al.*, 9-289.

3. STATUTORY. Under statute of Louisiana, pledges of stock in a corporation are valid against third persons by mere delivery of the certificates. This, too, although the certificates declare the stock to be transferable on the books of the company, without expressly requiring surrender of such certificates; *Factors & Traders Ins. Co. v. Marine Dry Dock etc. Co.*, 7-236.

4. TRUSTEE. Where shares of stock of a corporation are issued, to a trustee, to secure the payment of a debt the transaction constitutes a pledge of the stock, the title thereto remaining in the corporation; *Brewster et al. v. Hartley et al.*, 1-233.

5. —. A trustee has, prima facie, no right to pledge certificates of stock held by him, as a part of his trust fund, to secure his own debt growing out of transactions independent of the trust; *Shaw v. Spencer et al.*, 1-625.

6. NOT AUTHORIZED. A blank transfer of a certificate of stock with irrevocable power of attorney to transfer, signed by the person who appears by the certificate to be the owner, does not confer on the holder apparent authority, as agent for such owner, to pledge the stock as collateral; *Merchants Bank v. Livingston, imp.*, 8-547.

7. INSTANCE. Defendant, L., delivered to defendant, B., a certificate of stock as collateral for the loan of \$3,000. B. applied to W., plaintiff's agent, for a loan thereon of \$8,000, stating that he wanted it for a client. W. agreed to make the loan if B. would procure a proper power of attorney, to be attached to the certificate. B., by representing that he should have the instrument to secure his loan, procured from L. a transfer and irrevocable power of attorney to make a transfer, executed in blank. B. filled up

the blanks, save the name of transferee and attorney, and delivered it with the certificate to W., who, thereupon, made the loan. B. had no authority from L. to borrow or to pledge the stock. In an action to foreclose plaintiff's alleged lien on the stock, it was held that as B. did not claim to be the owner of the stock, but only to be acting as agent for the owner, and as he had, in fact, no authority, or apparent authority, so to act, L. was not estopped from asserting his title to the stock and plaintiff could not assert a lien save, at most, for the amount for which the stock was pledged to B.; that, while the transfer and power of attorney gave to B. an apparent ownership in case he had claimed title, or an apparent authority to sell as agent, it did not hold him out as authorized to make a loan or to pledge the stock, or at most, it only indicated that he could pledge the stock for an authorized loan. *Id.*

7½. PAYMENT WITH NOTICE. If a certificate of stock in a corporation expressed in the name of "A. B., trustee," is by him fraudulently pledged for his own debt, and accepted without inquiry; and the pledgee, after receiving notice of the fraud, and a demand of the parties beneficially interested under the trust that the stock shall be held subject to their direction, voluntarily pays an assessment due on the stock, to one of them, as treasurer of the corporation, in the presence of the other, such payment does not estop them from maintaining their claim to the stock; *Shaw v. Spencer et al.*, 1-625.

8. OF CORPORATE BONDS. Where the bonds of a corporation were issued on the understanding that they were to be sold for cash, but, as matter of fact, they were pledged to a creditor, as collateral security to corporate notes executed to and held by him, the objection that such disposition is unlawful is one open alone to the corporation or its stockholders. It can not be raised by one who holds the property of the corporation as the purchaser, at execution sale, of the equity of redemption, or one who holds under a voluntary conveyance; *Beecher v. Marquette & Pac. R.R. Mill Co. et al.*, 6-665.

9. COLLATERAL SECURITY. A certificate of stock of an incorporated company was deposited, with complainants, as collateral security for a loan of money. The defendant, N., who was the owner of the certificate, gave it to D., the other defendant, for the purpose of borrowing money on the security thereof. When the loan fell due, it was discovered that the power of attorney, by which alone the certificate could be transferred on the books of the company, had been stricken out. Neither of the defendants were aware of this until informed by complainants. N. refused to re-execute said power of attorney; and, the indebtedness remains unpaid. Under these circumstances, the court made a decree for the sale of the certificate of stock and that the proceeds thereof be applied to the payment of the amount due upon the loan; *Lewis, Johnson & Co. v. Dexter, Nash et al.*, 6-334.

10. **COLLATERAL.** Where shares of stock are deposited with a bank, as collateral security for the payment of notes, with power in the creditor to sell such stock and apply the proceeds to the payment of the notes, if they be not paid promptly at maturity, without further notice to the debtor, a mere failure on the part of the creditor to sell the stock at the maturity of the notes will constitute no defense to a suit thereon and give defendant in such suit, no right to damages; *Napier, exec'r, v. Central Ga. Bk.*, 9-68.

11. **SALE OF.** No statutory duty to sell exists. A debtor can not, by notice to his creditor, who holds stock as collateral security, force a sale thereof at his pleasure and, in default of immediate sale, recover damages against the creditor. *Id.*

12. **RATIFICATION.** Secretary of a corporation having, without express authority, pledged the corporate bonds, secured by recorded deed of trust, for an existing indebtedness and future advances, but, with the knowledge and acquiescence of the directors, his act was held binding, in the absence of fraud; *Darst v. Gale et al.*, 6-380.

13. **NOTICE OF PLEDGE.** In order to make the pledge of a certificate of the stock of a corporation valid, as to third persons, it is not necessary to give notice of the pledge to the company; *Factors & Traders Ins. Co. v. Marine Dry Dock & Ship Yard Co.*, 7-236.

14. **CONTEMPORANEOUS AGREEMENT.** A receipt stating that a certificate of stock in a corporation is received as collateral security and containing an agreement that pledgee may sell "on one day's notice," parol evidence of a contemporaneous agreement that the pledgee may use the stock is inadmissible; *Fay v. Gray*, 7-479.

15. **LIABILITY OF PLEDGEE.** One who receives a certificate of stock, as collateral security for a debt, the statute providing that stockholders shall be jointly and severally liable for the debts of the corporation contracted before the original capital is fully paid in to the extent of the par value of the stock held by him, is subject to such liability, unless his certificate shows that the shares are held in pledge. If he claims exemption the burden is on him — he must show the form of the certificate; *Nat'l Bank v. Hingham Manuf. Co.*, 7-496.

16. **RIGHTS OF PLEDGEE.** A person holding stock of a corporation, not as a stockholder, but merely as a pledgee, may bring an action on his own account, and in his own name, to protect his rights and interests as a pledgee and is not required in such matters to act through the association; *Baldwin et al. v. Canfield*, 7-641.

17. **LIEN OF, ON STOCK.** A promissory note, delivered to a banking corporation, concluded with the statement that the maker had pledged, as collateral security, certain shares in the capital stock of a corporation with authority to the holder to sell the

same "on the non performance of this promise, he giving me credit for any balance of the net proceeds of such sale and paying all sums then due from me to said holder." On tender of the amount due on the note at its maturity, the holder of the note had no right to retain the stock as security for other debts then due him from the maker; *Hathaway et al., trustees, v. Fall River Nat. Bk.*, 7-546.

18. LIEN OF, ON STOCK. Shares of stock in a corporation were pledged for the payment of a promissory note, with authority to pledgee to sell on non performance of the promise to pay. Later, the maker of the note assigned all his estate, real and personal, to trustees, for the benefit of his creditors. On the maturity of the note the trustees tendered the amount of the note to the holder, and, on his refusal to deliver the shares, brought a bill, in equity, to redeem the same. Even if the trustees had no greater rights than an assignee in insolvency, defendant could not, under the insolvency law of Massachusetts (Gen. Stat., ch. 118, § 20), set off other debts due him, from pledgor, at the time the note matured; and, in such case it is no defense that pledgee has applied the excess of value of the stock over the note it was given to secure in payment of such debts. *Id.*

19. POSSESSION AS DEFENSE TO ACTION FOR THE DEBT. In the absence of statutory stipulation to the contrary, the possession of pledged property does not suspend the right of pledgee to proceed personally against the pledgor. It follows that the fact that the pledged property of a corporate defendant remains undisposed of will not operate as a bar to plaintiff's action; *Sonoma Valley Bank v. Hill*, 9-20.

20. DEPRECIATION OF. In suit brought upon notes secured by pledge of stock, to a banking corporation, a plea that the bank had notice from the debtor, both before and after the debt became due, to sell the stock and that it failed and refused to regard such notice because one or more of its officers and some of its stockholders were largely interested in the stock, of which that pledged was a part, and were engaged in an effort to depreciate the same and, thus, to buy the controlling interest therein for less than its value and, in fact, did so depreciate it and that defendant was injured, by the refusal to sell, in the sum of \$1,250, presents a substantial defense, which should not be stricken on general demurrer. Want of particularity in setting forth the names of the officers and stockholders so proceeding, or the mode of operation, might furnish good ground for special demurrer; *Napier, exec'r, v. Central Georgia Bank*, 9-68.

21. —. That the president of the creditor bank and another stockholder therein engaged in depreciating the stock of which that held by the bank, as collateral security, formed a part, with a view to purchasing a controlling interest therein and, in fact, succeeded in effecting such depreciation, whereby the debtor

was injured, did not, without more, make such conduct the act of the bank, so as to furnish a basis for a recovery of damages against it. A plea of recoupment to a suit by the bank, on the notes of the debtor setting up the above facts, is demurrable. *Id.*

22. DEPRECIATION OF. A plea that the creditor bank, through its president, corresponded with defendant about the sale of the stock and led him to believe that it was trying to sell the same, which was untrue, and the stock depreciated, causing him damage, is demurrable, as setting up conclusions, or impressions, of defendant's mind instead of facts of fraud. *Id.*

23. CONVERSION OF. If a certificate of stock in a corporation, pledged as collateral security, is transferred by the pledgee to a creditor of his own, the pledgor may treat this as a conversion. The fact that the pledgee has a greater number of shares standing to his credit on the books of the corporation is immaterial; *Fay v. Gray*, 7-479.

24. NOTICE TO PURCHASER. If a certificate of shares, expressed to one as "trustee," is by him pledged to secure his own debt, pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust. If he accept the pledge without inquiry he does so at his peril; *Shaw v. Spencer et al.*, 1-625.

25. WRONGFUL SALE BY PLEDGEE. The pledgee of stock, who holds such stock for the payment of money borrowed, holds subject to pledgor's legal right to demand and receive the shares upon payment of the debt. Pledgee has no right to sell such shares without first demanding payment of the debt from pledgor, or giving him notice of the intention to sell. So he may not sell the stock at private sale for less than its current value. If he does, he becomes responsible to pledgor for the difference between the amount of the debt secured and the market value of the stock; *Nabring v. Bank of Mobile*, 6-124.

26. ABSOLUTE TRANSFER. A plea which merely alleged, in an action on notes secured by pledge, that twenty-five shares of the stock were transferred absolutely to the bank, the president refusing to make the loan without such transfer, affords no defense and is demurrable; *Napier, executor, v. Central Ga. Bank*, 9-68.

27. VOTE ON STOCK PLEDGED. A person who pledges stock has the right to vote upon it until the title of the pledgee to the stock is perfected, unless there be an agreement to the contrary; *Hopkin et al. v. Buffum et al.*, 4-151.

28. —. The pledgor of stock which stands on the books of a corporation in the name of the pledgee, may, by proceeding in equity, compel a transfer to him or oblige the pledgee to give him a proxy to vote; but, where the pledgor acquiesces, for years, in the control of the stock by the record owner, the pledgee, and makes no attempt to inform the corporation of the true state of facts until a contested election occurs and then not until the votes

are being or have been counted, it is too late to ask the interference of a court with the result of such election as declared. *Id.*

29. **VOTE ON STOCK PLEDGED.** When the statute under which a corporation is organized provides that the directors shall be elected by the stockholders, it can not confer upon a trustee, holding stock as a pledge, the right to vote at an election of such officers; *State v. Curtis*, 1-233.

30. —. Stock owned by a corporation, even when held by a trustee, can not be voted upon by any person. *Id.*

31. **CLOUD OF VOID DEED.** Holders of the stock of a corporation, holding as pledgees, are interested in the preservation of the corporate property and in preventing it from passing out of the hands of the corporation. They have, therefore, a right to take legal means to preserve the corporate property and to prevent it from being lost to the corporation, or its value from being impaired. If such value is impaired by a cloud upon the title of the corporation to real property, they have a right to have the cloud removed. *Baldwin et al. v. Canfield*, 7-641.

See **ELECTION**; **MANDAMUS**.

POLICE POWER.

1. **DEFINED.** The police power of the state is a power co-extensive with self protection, and is not inaptly termed the law of overruling necessity. It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. It may be exercised to control the use of property of corporations as well as of private persons; *Town of Lake View v. Rose Hill Cem. Co.*, 5-252.

2. —. The police power of a state is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property. It extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state, and persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; *Slaughter House Cases*, 5-1.

3. **UNIVERSALITY.** With certain constitutional limitations, the rights of all persons, natural or artificial, are subject to such legislative control as the legislature may deem necessary for the general welfare. It is a fundamental error to suppose there is any difference, in this respect, between the rights of natural and artificial persons. They both stand upon the same footing; *Ward, rec'r, v. Farwell et al.*, 6-490.

4. **SCOPE AND INVIOABILITY.** The police power extends to the protection of the lives, health and property of the citizens, and the preservation of good order and the public morals, and the legislature can not, by any contract, divest itself of the power to provide for these objects, nor can it bargain away its discretion to exercise it; *Beer Co. v. Massachusetts*, 6-43.

5. **PARAMOUNT FORCE.** All rights are held subject to the police power of the state; except that property actually in existence, and in which the right of the owner has become vested, may not be taken for the public good without due compensation. *Id.*

6. **COMMERCE.** The power in congress to regulate commerce does not exclude the exercise of concurrent power by the states, except so far as congress has actually exercised its power. No act of congress is to be interpreted, in the absence of express words, to invade the police power of the state. The regulation of the doing of business by a foreign corporation is such a police law of the state; *Am. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

7. **THE AUTHORITY TO EXERCISE.** As a general proposition, it is the province of the law making power to determine when the exigency exists, calling into exercise the police power. What are the subjects of its exercise, is clearly a judicial question; *Town of Lake View v. Rose Hill Cem. Co.*, 5-252.

8. **LEGISLATIVE POWER.** The legislature has a right to subject persons and property to restraints, in order to secure the general comfort, health and prosperity of the citizens of the state. Ordinances regulating the traffic in all kinds of products are common to all cities, and, equally common, to prohibit the sale of these commodities except upon the certificate of an officer as to the weight according to public scales. Laws requiring articles to be inspected or weighed or measured before being sold are in the nature of police regulations, and are valid in the absence of special constitutional provisions, and, if reasonable, are not in restraint of trade; *Gaines et al. v. Coates*, 5-503.

9. **EXERCISE OF.** So far as franchises of a corporation are publici juris it has, always, been held that the state may properly legislate touching them. Such legislation is not prohibited by that clause of the constitution of the United States which forbids the passage of laws impairing the obligation of contracts, nor does it deprive such corporations of any of the substantial benefits intended to be conferred by the acts of incorporation. *Id.*

10. **PROTECTION OF COMMUNITY.** The legislature is authorized, in the proper exercise of the police power, to adopt such necessary legislation and regulations as will effectually protect community from losses and injury incident to a public business, conducted by a corporation, under a charter from the state, where such business has become hazardous and will, probably, result in financial distress to those who, in ignorance of its condition, do business with it; *Ward, rec'r, v. Farwell et al.*, 6-490.

11. CORPORATE RIGHTS. Where a corporation is formed, under legislative sanction, it becomes amenable to the police power of the state, to the full extent that natural persons are subject to its control; *Ruggles v. People*, 6-428.

12. —. Corporations are under the control of the state to the same but to no greater extent than individuals. The legislature may require of such bodies, the performance of any and all acts, which they are capable of performing, which they may require of individuals. *Id.*

13. AS TO CORPORATIONS. It is essential that police regulations must have reference to the comfort, safety or welfare of society, and when applied to corporations, they must not be in conflict with any of the provisions of the charter. It is not lawful, under the pretense of police regulations, to take from a corporation any of the essential rights and privileges conferred by its charter; *Town of Lake View v. Rose Hill Cem. Co.*, 5-252.

14. INSTANCE. An act granting, to a corporation, the exclusive right, during a term of twenty-five years, to have and maintain cattle landings, stock yards and slaughter houses within one or more parishes and prohibiting the landing, inclosing or slaughtering animals for use as food at any place other than as designated; but, permitting all butchers to slaughter at such houses, and charging a reasonable fee for each animal received and slaughtered thereat is a police regulation, for the preservation of the health and the promotion of the comfort of the people, the statute locating the abattoir at a suitable place, is within the power of the state legislature unaffected by the constitution of the United States; *Slaughter House Cases*, 5-1.

15. —. A state legislature passed "an act in relation to the duties of railroad companies" providing (1) That each such company should, annually, in a month named, fix its rates for the transportation of passengers and freight of different kinds. (2) That it should, on the first day of the next month, cause a printed copy of such rates to be posted at all its stations and depots and cause a copy to remain so posted during the year. (3) That a failure so to post rates, or the charging of a higher rate than so posted, should subject the offending company to certain prescribed penalties. Subsequently congress passed "an act to facilitate commercial, postal and military communication among the several states," reciting the power of congress to regulate commerce among the several states and enacting "that every railroad company in the United States, whose road is operated by steam . . . be and, hereby, is authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freights and property on their way from any state to another state, and to receive compensation therefor" and the act provided "that congress may, at any time, alter, amend or repeal this act." Held, that, as affecting a railroad running in

several states, the state legislation was but a police law and, therefore, not unconstitutional; *Chicago & Northwestern R.R. Co. v. Fuller*, 5-21.

16. **INSTANCE.** The legislature may fix the maximum charges of corporations, as well as of individuals, as common carriers, warehousemen, or others exercising a calling, or business, public in its character, or in which the public has an interest to be protected against extortion, or oppression; *Ruggles v. People*, 6-428.

17. —. A provision of a state constitution, providing that "no foreign corporation shall do any business in this state without having, at least, one known place of business and an authorized agent, or agents, therein," is not repugnant to the commercial clause of the federal constitution; it is but the legitimate exercise of the police power of the state; *Amer. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

18. —. Cemeteries concern the public health. The legislature has the right to pass laws to regulate interments, to prevent injury to the health of community, notwithstanding the burial place may be owned by a corporation, which exercises franchises conferred by the state; *Lake View v. Rose Hill Cem. Co.*, 5-252.

19. **INSOLVENCY.** For the protection of the public, it is a proper exercise of the police power of the state, that the legislature shall prescribe what amount of assets an incorporated company shall possess, or on what basis its solvency shall be estimated; *Chi. L. Ins. Co. v. Auditor etc.*, 9-79.

20. **GOVERNING CONTRACTS.** Contracts between corporations and dealers with them are entered into subject to this right of legislation; wherefore, an act to wind up a corporation (in this case, an insurance company), when its financial condition is such as to be hazardous to parties contracting with it, is not obnoxious to the objection that such legislation impairs the validity of the contract entered into; *Ward, rec'r, v. Farwell*, 6-490.

See FOREIGN CORPORATION.

POWERS.

1. **MUNICIPAL; GENERAL.** A municipal corporation possesses and can exercise the following powers and none others: 1. Those granted in express words. 2. Those necessarily implied or necessarily incident to the powers expressly granted. 3. Those absolutely essential to the declared purposes and objects of the corporation — not simply convenient but indispensable. Any fair doubt as to the existence of a power is resolved by the courts against the corporation and the existence of the power; *Merriam v. Moody's Exec.*, 2-283; *Tucker v. City of Virginia*, 2-599.

2. **MUST BE EXPRESSLY GRANTED.** Municipal corporations possess and can exercise only such powers as are expressly or by necessary implication conferred or delegated by legislative autho-

city; and, when the legislature prescribes the mode of exercising delegated powers, such mode must be strictly pursued. *City of Placerville v. Wilcox*, 2-62; *Nicholson Pavement v. Painter*, 2-91.

3. CAN NOT BE DELEGATED. The charter of a municipal corporation provided that its "general council may pass ordinances to procure the grading etc. of sidewalks." It was held that the power to determine whether or not such improvements were necessary was vested in the council, and could not be delegated to the city engineer; *Hyde & Coose v. Joyes*, 2-76.

4. —. To ordain generally that a street or square shall be graded and paved, or "so much thereof as the engineer might direct, and according to specifications by him furnished," is a delegation of the power to fix the grade, what material shall be used, and how much of the street or square shall be thus improved. Such an ordinance is void and can not be validated by subsequent ratification. *Id.*

5. —. Where the charter required the common council of a municipal corporation, as a condition precedent to the levy of a tax, to declare, by an entry on the minutes, what portion of the expenses of a certain improvement should be assessed to the owners of premises to be benefited thereby, and specifying the amount to be assessed, it was held that the power could not be delegated to commissioners; *School District v. Dean et al.*, 2-519.

6. TRANSFER OF. The statute of Missouri, relating to bridges, provided that the commissioner might take, or cause to be taken, from the adjoining or most convenient lands, such quantities of rock and timber as might be necessary for building and repairing, and provided for compensation therefor. A contractor undertook to build a bridge, and to "furnish all material required for said bridge and to receive as full compensation therefor" a specified sum. Held, (1) *Per HOLMES, j.* That the contractor, as the agent of the commissioner, had the power to take material, in the manner prescribed by the statute. (2) *Per CURIAM.* That the statute authorized such taking by the commissioner only after the contractor had failed to perform his contract to build or repair, and that the commissioner could not delegate his power; *Schmidt v. Densmore*, 2-575.

7. —. The board of supervisors of San Francisco can not, by resolution, transfer its appropriate functions to its clerk; *Meuser v. Risdon et al.*, 2-101.

8. BOARD OF SUPERVISORS. In the matter of the improvement of streets, the board of supervisors of the city and county of San Francisco have the powers conferred upon them by statute and no others. The powers conferred must be exercised in the mode prescribed and in no other; *Nicholson Pavement Co. v. Painter*, 2-91.

9. TO TAKE EFFECT ON FUTURE CONTINGENCIES. A municipal corporation may pass an ordinance within the limits of its delegated powers contingent, as to its operation and effect, on the future existence or occurrence of facts germane to its subject matter ; State, ex rel., *v. Kirkley et al.*, 2-406.

10. ——. A law which by its own terms is to have no effect until the happening of some contingent result can not be made effective before the event happens by any acts or series of acts passed upon the assumption that the result has happened, and that the law is in force. All such acts, instead of passing any curative powers, merely multiply errors. *Id.*

11. TO COLLECT TAXES. An act of incorporation, granting to the common council of a city the right to levy and collect certain taxes, constituted the city marshal ex officio collector, and made it his duty to collect all the taxes due the city. Held, that an ordinance regulating the collection of taxes remaining unpaid after a certain date, devolving such duty upon the city attorney and dispensing with the services of the city marshal, was void ; City of Placerville *v. Wilcox*, 2-62.

12. IMPROVEMENT OF STREETS. Under the statute regulating street improvements in San Francisco, the board of supervisors adopted a resolution of intention to grade certain streets and a crossing. They subsequently ordered the work to be done. The bidders were notified to put in separate bids for each block and crossing. The board accepted bids for the entire work, but the superintendent contracted with the successful bidder for one block only. Held, (1) that the resolution of intention, and its publication constituted the sole authority of the board to proceed to order said work to be done, and that it conferred no authority to have other or different work done ; (2) that the work described in the resolution constituted but one subject matter ; (3) that the contract, by reason of the variance between it and the resolution accepting the bids, which constituted the superintendent's sole authority, was unauthorized and void ; (4) that a valid assessment must be founded upon a contract duly authorized and executed as required by the terms of the law ; Dougherty *v. Hitchcock*, 2-79.

13. CONTRACTS ; PATENT. The charter of the city of Detroit invested the city council with power to improve the streets, and provided that no contract for the construction of any public work, including paving, grading, planking and macadamizing the public streets, if the same should exceed the sum of \$200, "should be let or entered into, except to and with the lowest responsible bidder," after notice advertised in the manner therein prescribed. Held, that this did not preclude the city council from entering into a contract for the paving of the streets with the Nicholson pavement, which was protected by a patent, and the right to use

which was owned exclusively by one firm, who was the only bidder; *Scholfield v. City of Lansing et al.*, 2-538.

14. BOARD OF SUPERVISORS; JURISDICTION. Under the statute regulating the improvement of streets in the city of San Francisco, the board of supervisors acquire jurisdiction of the subject matter of the improvement of a street after the expiration of the notice of intention to improve, as provided by the statute; *Dougherty v. Miller et al.*, 2-95.

15. FRONTAGE; SUBSEQUENT DIVISION. If, at the time the boards acquire jurisdiction, and the contract for the improvement is let, any part of the land fronting upon the street constitutes one lot, the contractor is entitled to have the cost of the improvement made opposite the lot assessed on the whole of the same, in one assessment; and no subsequent change in cutting off the same by selling parts thereof can defeat that right. *Id.*

16. JURISDICTION; SUBSEQUENT DIVISION. When the jurisdiction of the board once attaches to the entire lot, it extends through the entire proceeding, though it may be subsequently divided by a sale of a portion thereof to other parties. *Id.*

17. STATUTE CONSTRUED; PATENT. The statutes governing the improvement of streets in the city of San Francisco require the board of supervisors, after taking the proper preliminary steps for the improvement of a street, to advertise for sealed proposals for the contemplated work, and to award the work to the lowest responsible bidder. Held, that the board could not, under this statute, order a pavement to be put down when patented, and the patent held by one party against whom there can be no competition in the bidding; *Nicholson Pavement Co. v. Painter*, 2-91.

18. NICHOLSON PAVEMENT. The board of supervisors of said city and county can cause the Nicholson pavement to be put down in the streets of said city only in the manner prescribed by the act of 1866, upon the petition of a majority of the owners or their agents, in frontage, and upon the condition that it shall not cost to exceed twenty-eight cents per square foot. *Id.*

19. TO SUBSCRIBE FOR STOCK. The statute of the state of Indiana, relating to the incorporation of cities, provides "that any incorporated city, under this act, shall have power to borrow money, to subscribe to the stock of any railroad running in to or through such city, to aid in the construction of such roads, only on petition of a majority of the resident freeholders thereof." It was held, that this statute conferred authority upon cities to subscribe to the stock of railroads running in to or through the city, and to borrow money by executing its bonds to pay such subscriptions; *Thompson v. City of Peru*, 2-213.

20. DONATIONS AND SUBSCRIPTIONS. There is an essential difference between a subscription of stock in a corporation and a donation thereto. Under said statute the petition of a majority

of the resident freeholders is necessary to the validity of a donation, but it is not essential to a subscription of stock. *Id.*

21. **TO ISSUE BONDS; CONSTRUCTION OF STATUTE.** The general power was conferred upon the county court to subscribe for stock in a railroad company, subject to the provisions of the general railroad law of the state. The general railroad law referred to provided that the county "may, for information, cause an election to be held to ascertain the sense of the tax payers" as to such subscription. Held, that the word "may" should be interpreted to mean "shall," and that such vote was essential to the exercise of the power; *Hobert v. City of Detroit*, 2-527.

22. **FUND EXISTING DEBT.** The requirement of the charter of a city, that money borrowed should be expended and applied in the liquidation of its debts, and in the permanent and useful improvement of the city, is not a prohibition against funding an existing debt and issuing the necessary evidences thereof in such mode and form as the parties may agree upon; *City of Galena v. Corwith*, 2-197.

23. **INDEPENDENTLY OF THE CHARTER.** The power of a municipal corporation to pay debts, or provide for their payment, to fund them and issue the necessary evidence thereof, exists in every corporation to the same extent as in natural persons, and this without any express authority in the charter. *Id.*

24. **GENERAL POWERS.** Corporations have all the powers of ordinary persons, as respects their contracts, except when they are expressly, or by necessary implication, restricted. *Id.*

25. **BOARD OF SUPERVISORS.** Boards of supervisors have the power, as incidental to that of buying, selling and leasing property, and the management, care and preservation thereof, to take all legal measures necessary to that end, by suit or otherwise, and therein have large discretionary powers; *Hornblower v. Duden*, 2-86.

26. **EXERCISE OF DISCRETION.** If, in the exercise of discretion, the board, believing that the interests of the county are involved in a matter, take legal measures, by suit or otherwise, to advance or protect those interests, the expenses incurred are a legal charge upon the county, notwithstanding the courts might ultimately hold that they had adopted the wrong remedy, or were entitled to no remedy whatever. *Id.*

27. **EMPLOY COUNSEL.** The board of supervisors has the power to employ counsel other than the district attorney, to prosecute or defend, or assist in the prosecution or defense, of any suit in which the county has an interest, whether it be a party to the record or otherwise. *Id.*

28. **NOT REVIEWABLE.** The exercise of discretion by the board in such matters is not reviewable by the courts. *Id.*

29. **SCHOOL DISTRICT COMMITTEE.** Authority to prosecute actions is not incidental to the official power of a prudential com-

mittee of a school district, under the laws of Massachusetts; *Burgess v. School Dist.*, 2-492.

30. IMPLIED POWER. The vote of a school district directing its prudential committee "to look into the rights of the districts," implies authority to consult counsel as to those rights, but not to prosecute an action; and a subsequent vote of the district to stop such an action does not render the district liable for expenses previously incurred by the committee in prosecuting it. *Id.*

31. TO ABOLISH SCHOOL DISTRICT. The general statutes of the state of Michigan invested the boards of school directors with power to create and abolish school districts within the territory of their several jurisdictions. The legislature, by special enactment, created a school district, and embraced within its limits portions of three districts already existing, and made provision for the collection of taxes assessed on the property of the three districts before the creation of the fourth one, and for the division of the same among the four districts existing thereafter. The board of inspectors abolished, in the manner prescribed by the general law, the new district, and assigned to each of the original districts the territory taken therefrom when the new district was created. Held, (1) that, inasmuch as the controversy might involve the taking of an account of the taxes collected, a court of equity had jurisdiction to hear and determine the questions presented by the action of the board of inspectors; (2) that the inspectors had no authority, in the exercise of the powers conferred by the general statute, to divide the district created by a special enactment; *School Dist. v. Dean et al.*, 2-519.

32. GRANT LICENSES. The act amending the several acts incorporating the city of Holly Springs, Mississippi, conferred upon the mayor and aldermen of the city "the exclusive right to grant licenses for the sale of spirituous and vinous liquors within the corporate limits of the same." The general statutes of the state, in force when this act was passed, conferred this power as to towns of the same class upon the county board of police, and provided that it should be exercised only upon the petition of a majority of the legal voters "residents within the corporate limits of the town within which the liquors were to be sold," which petition should be laid over for consideration one month after it was received and filed: Held, that the special act only transferred the authority as to Holly Springs from the county board to the mayor and aldermen, and that its exercise by the latter was subject to the limitations and restrictions prescribed by the general law; *House v. State of Mississippi*, 2-563.

33. PROVIDE FOR INDIGENT SICK. Authority in a common council to elect a city physician, and to "establish a board of health, to prevent the introduction and spread of disease, to establish a city infirmary and provide for the indigent" is legitimately exercised by entering into a contract securing medical at-

tendance, and making other provisions for the indigent sick. Such authority can be exercised only in behalf of the indigent; *Tucker v. Virginia City*, 2-599.

34. FEES OF PHYSICIAN. When the fees of a physician employed by a city for attendance upon the indigent are not fixed at the time of his appointment or performance of service, he may recover their reasonable value. *Id.*

35. IMPLIED CONTRACT. A municipal corporation may be bound by an implied contract upon the same principle that an individual or private corporation is so bound. *Id.*

36. COMMISSIONERS; ROADS. When the law casts upon the county commissioners the duty of protecting the public roads from injury, and to keep them in proper repair for public use, the public right becomes paramount to that of individuals which would be affected by the discharge of such duties, and if, by reasonable and necessary improvement to the highway, a party suffer consequential damages, it is *damnum absque injuria*, and no right of action accrues to him; *Tyson v. Commissioners etc.*, 2-391.

37. SUBSCRIBE FOR TURNPIKE STOCK. An act of the legislature of Kentucky authorized all the justices of the county court to subscribe not exceeding \$750 per mile to any chartered turnpike in the county, "provided that such subscription shall not be made until said court shall be satisfied that an amount of stock sufficient, with the aid of said county subscriptions, to complete each mile of road to which such county subscriptions apply, has been taken by private subscription." Held, that such private subscriptions were indispensable to the special authority conferred upon the court; *Clay et al. v. Nicholas County Court*, 2-345.

38. CITY COUNCIL. The power conferred upon a city council to establish such by-laws, rules and ordinances, as shall appear to them requisite and necessary for the security, welfare and convenience of the city, for preserving peace, order and good government within the city, confers authority to make such rules and regulations as the health, comfort and convenience of the people may require, and to provide for the punishment of all offenses as are not under the constitution and laws punishable in the criminal courts of the state. As to offenses punishable under the laws of the state, the council can only make provision for having the offenders bound over to answer in the proper counts; *Vason v. City of Augusta*, 2-136.

39. GUARANTY. The common council of the city of New Orleans has no power to bind the city by a contract of guaranty with a lessee of its wharves, undertaking that the income arising from the leased property shall amount to a specific sum; *Patterson v. City of New Orleans*, 2-367.

40. TO RESCIND ORDERS. The board of commissioners of highways in Illinois may modify, rescind or alter any order made by

their predecessors, provided such modifications, alterations or rescission does not affect the rights of third persons acquired thereunder; *People, ex rel. Stine, v. Board etc.*, 2-162.

41. NOTICE. Parties dealing with the agents or officers of a municipal corporation must, at their peril, take notice of the limits of the powers, both of the municipality and those who assume to act as its agents or officers; *State, ex rel., v. Kirkley et al.*, 2-406.

42. ACQUIRE PROPERTY. At common law a municipal corporation can take and hold the title to such lands only as its necessities may require; *Root v. Shields*, 2-15.

43. TAKE TAX DEEDS. The statutes of Kansas confer upon counties the power to purchase land sold at tax sales, but they are not authorized to receive conveyances of the same by deed. They may receive certificates of sale and transfer the same by assignment in the manner prescribed by the statute; *Guittard Township v. Commissioners etc.*, 2-323.

44. —. Under the statutes of Kansas a county may purchase lands at tax sale and receive certificates of sale, but it can not receive a deed, and a deed executed conveying to a county lands so purchased is a nullity; *State, ex rel., v. Magill*, 2-327.

45. EFFECT AS AGAINST THIRD PERSONS. That such a deed has been executed is not a sufficient defense to proceedings by mandamus by a third person who has entitled himself to an assignment of the certificate. *Id.*

46. EXTENT OF. A corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted; *Weckler v. Nat. Bank*, 7-354.

47. —. A corporation is a creature of law. It has no powers except those expressly granted or necessarily implied; and none can be implied except such as are necessary to the exercise and enjoyment of those expressly granted; *Board of Comm'rs of Tippecanoe Co. et al. v. Lafayette etc. R.R. Co. et al.*, 7-26.

48. LIMITATIONS ON. A corporation can not, by by-laws, resolutions or contracts, enlarge or abridge the power given to the stockholders by the statutes of the state; *Brewster et al. v. Hartley et al.*, 1-233.

49. —. A corporation possesses no powers except those given by its charter, either by express language or implied as necessary in strict furtherance of the objects of the incorporation; *Diligent Fire Co. v. Commonwealth*, 5-613.

50. —. Contracts, engagements and acts of a corporation not necessarily embraced within the scope of the undertaking authorized by the act of incorporation, can not be legally made or performed by the corporation. It has no power or authority other than that which is expressly given it or which necessarily flows from those given; *Pittsburg & Connellsville R.R. Co. v. County of Allegheny*, 4-92.

51. **LIMITATIONS ON.** Corporations have such powers as are specifically granted by charter or are necessary to carry into effect such specified power. These only. They must act strictly within the scope of the powers conferred and, where a grant of power is relied on, the mode prescribed in the grant for its exercise must be pursued according to the grant; *Matthews v. Skinker*, 8-149.

52. —. Limitations on powers to be exercised by corporations and natural persons are to be interpreted, alike in both cases, by the terms in which they are expressed and without reference to the fact that they are powers inherent or conferred; *Farmers & T. Bank v. Harrison et al.*, 8-129; *Rittenhour v. Same*, 8-137.

53. —. Generally, a private corporation can not go into any business, or do any act, not fairly within the extent of its granted powers; *Chapman v. Colby Bros. & Co.*, 7-578.

54. —. A corporation, being the creature of the law, possesses only those powers which the charter of its creation confers upon it, either expressly or as incidental to its very existence; *N. Orl. etc. Steamship Co. v. Ocean Dry Dock Co.*, 7-195.

55. —. The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted, and not as having any other. *Id.*

56. —. As a corporation is a mere creature of the act of incorporation, it has no other powers except such as are in said act expressly granted, or are necessary to effect the ends and objects of its existence. Every power which it possesses need not be granted in detail, but the company is confined, in its operations, to the objects and purposes expressly set forth in its charter, and it can undertake no other enterprise than is there expressly mentioned; *Central R.R. Co. et al. v. Collins et al.*, 3-224.

57. —. The charter of corporations constitute the chart of their authority and they have no powers except such as are expressly granted and such as are auxiliary and necessary, to carry out and subserve the object of their creation; *Pacific R.R. Co. v. Seely et al.*, 3-529.

58. —. A corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted; *Vandall et al. v. South San Francisco Dock Co.*, 3-150.

59. —. A corporation can not lawfully exercise any power not conferred upon it by the statute creating it or under which it is organized; *Rochester Ins. Co. v. Martin*, 3-486.

60. **WITHHELD.** Powers not conferred on a corporation are withheld and denied, as much as though express language of prohibition was employed. *Id.*

61. **CONSTRUCTION OF STATUTORY LIMITATION.** A statute forbidding corporations to exercise any powers except the ordinary powers incident to corporate existence, the powers expressly given

by charter, or act of incorporation, and such as shall be necessary to the exercise of the powers so enumerated and given, must be construed as a prohibition of any acts not within the scope of the powers permitted and as operating to render contracts, in contravention of it, illegal and void; *Morris & Essex R.R. Co. v. Sussex R.R. Co.*, **3**-579.

62. **NECESSARY POWERS.** Unless restrained by the charter, the grant of corporate powers carries with it the powers necessary to carry the franchise into effect. The power to contract, to incur debts etc., would seem to be incident to every corporation, unless the charter provides to the contrary; *Wood Hydr. H. M. Co. v. King*; **4**-344.

63. **IMPLIED.** The power to do acts and make contracts necessary to enable a corporation to answer the ends of its creation, like the express grants of power, is to be strictly construed and is limited, by all the cases and by the general principles of all the books, with this qualification, that even for this purpose, the company can not engage in any new and distinct enterprise, involving new risks to its stockholders and not fairly within the terms of the original grant; *Central R.R. Co. et al. v. Collins et al.*, **3**-224.

64. —. The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied, where there is no positive restriction in the charter; *Morville v. Am. Tract Soc.*, **7**-473.

65. **EXTRAORDINARY POWERS.** Extraordinary authority can only be conferred upon a corporation by express words; it will not be implied. A corporation created by statute possesses only those powers which the charter confers upon it, either expressly or by implication, as necessary to its very existence, and this necessity must be so essential to the enjoyment of some special grant that without it, that grant would fail; *Gaines et al. v. Coates*, **5**-503.

66. —. After shareholders of a corporation have entered into a contract among themselves, under legislative sanction, and expended their money in the execution of the purpose mutually agreed upon, that purpose can not be radically changed by the majority, by virtue of legislative enactment, so that a dissentient stockholder shall be compelled to engage in a totally different undertaking, without impairing the obligation of his contract with his associates and with the state; *Black et al. v. Delaware etc. Canal Co. et al.*, **5**-547.

67. **INCIDENTAL.** By the common law every corporation has, as an incident to its corporate existence, among others, the powers of purchasing and alienating lands and chattels; of entering in to contracts, necessary to carry out the purposes of their creation and, as a consequence, to incur debts and secure them, by negotiable paper, mortgage, and the like. It will be presumed of all corporations, in the absence of prohibition or restraint of statute, or

charter, that each and every company possesses such incidental powers; *Kelly et al. v. Trustees of the Alabama & Cincinnati R.R. Co.*, 6-130.

68. INCIDENTAL. A corporation which is competent to sue, or to be sued, has power incidental to execute a bond necessary, or proper, in the course of judicial proceeding; *Collins et al. v. Hammock*, 6-143; *Collins v. Garrett*, 6-143.

69. —. A corporation organized under a general law which provides for the formation of any manner of corporation for "lawful purposes except banking, insurance, real estate brokerage, the operation of railroads and business of loaning money," and the objects of which, as declared in articles of incorporation, are "the manufacture and sale" of specific articles, has power, if the exercise thereof be necessary for the proper transaction of its business, to sell for cash or on credit and to receive and hold the proceeds; to appoint agents and hold them responsible for all proceeds of sales; to receive notes and to purchase, or receive from its agents, notes executed to them in course of business; *Western Cottage Organ Co. v. Reddish*, 6-560.

70. —. Where a corporation has the right, under its charter, to make all contracts necessary for the erection of a specified building, it has the power to accept, for payment, an order drawn, in favor of a material man, by the contractor for erection of the building, payable from the money due the latter by the corporation; *Trustees of Prairie Lodge v. Smith*, 8-66.

71. DISCRETIONARY. Corporations in the exercise of discretionary powers, conferred by statute, must so exercise them as not to infringe upon the established legal rights of others; *Holmes, Booth & Haydens v. The Holmes, Booth & Atwood Manufacturing Co.*, 3-210.

72. TEST OF POWER. In ascertaining the power of a corporation, as respects a given act, it is necessary to consider (1) whether it falls within the powers enumerated in its charter, articles of association, or certificate under a general law, or (2), whether it is necessary to the exercise of one of the powers therein enumerated; *Vandall et al. v. South San Francisco Dock Co.*, 3-150.

73. A CASE INSTANCED. A corporation chartered "to buy, improve, lease, sell" etc. real estate, owning land in the vicinity of a railroad, may properly appropriate a portion of its funds for the purposes of increasing the facilities and lessening the cost of transportation on such railroad, where the direct and proximate tendency of such increase of facilities is to enhance the value of the company's lands. *Id.*

74. DETERMINATION OF RIGHTFULNESS OF EXERCISE. In determining whether a corporation can make a particular contract, it must be considered, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and, if the charter and valid statutory law are

silent upon the subject, in the second place, whether the power to make such a contract may not be implied, on the part of the corporation, as directly or indirectly necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to that purpose; *Weckler v. Nat. Bank*, 7-354.

75. **AT COMMON LAW.** Every corporation "for the purposes declared by the charter" might, by the common law, hold and possess any kind of real and personal property and make any kind of a contract whatsoever; *Cent. R.R. Co. et al. v. Collins et al.*, 3-224.

76. **TO ACQUIRE PROPERTY.** A corporation chartered for a specific purpose has no power to take a lease of property not needed for that purpose, or other substantial use, with the intention and for the purpose of harassing another party by the use, under the forms of law, of the supposed rights thus obtained. Where a party has a legal right, his motive for asserting that right is immaterial; but, where a corporation obtains title to property, for the sole purpose of making a malicious use of it, the motive becomes material as affecting the question of power; *Occum Co. v. Sprague Manuf. Co.*, 1-295.

77. **TO ACQUIRE AND HOLD REAL ESTATE.** A corporation created by and existing under the laws of the state of Illinois, authorized by its charter to purchase, receive conveyance of and hold title to land for prescribed purposes, purchasing and receiving a deed executed to it by one competent to convey, becomes vested with the title, and the question whether such corporation has exceeded its power, or violated its charter, in making the purchase, is one between the state and the company with which the grantor, as such, has no concern; *Hough v. Cook Co. Land Co.*, 5-295.

78. —. A corporation (in California) for the construction of turnpike roads, can hold only such real estate as the purposes of the corporation may require; *Coleman v. San Rafael Turnpike Co. et al.*, 5-159.

79. **MODE OF ACQUIRING.** When a corporation has the capacity of acquiring and holding personal and real property, the mode of acquiring not being limited, it may acquire the same either by purchase or gift; *Ala. G. L. Ins. Co. v. Cent. Agric. etc. Ass'n*, 6-108.

80. **BOND FOR DEED.** A bond to convey land to a corporation, which the purposes of the corporation do not require, is void; *Coleman v. San Rafael Turnpike Co. et al.*, 5-159.

81. **ACQUISITION OF REALTY.** It can not be presumed, by the federal supreme court, that it is, or was, against the public policy of a state, that one of her citizens, owning real estate, should convey it to a benevolent corporation of another state of the nation, for the purpose of enabling it to carry out the objects of its creation, if such state permits her own corporations, organized for

like purposes, to take such real estate by purchase, gift, devise, or in any other manner; *Christian Union v. Yount*, 6-69.

82. **LIMITATION BY SUBSEQUENT LEGISLATION.** Where a general law for the incorporation of corporate bodies contains no limitations as to the capacity to acquire and hold lands, but declares that such act shall be subject to any limitation or modification that may hereafter be enacted, by general law, as to the amount of real estate to be held by such corporations, a subsequent general law limiting their capacity to acquire lands to ten acres will bind them, and any conveyance to them of lands afterward, when they have already acquired ten acres or more of land, will be null and void; *St. Peter's Rom. Cath. Cong. v. Germain*, 9-185.

83. **TO TAKE AND HOLD REAL PROPERTY.** The main objection to allowing corporations in the state of their creation to hold lands not occupied and used in, or necessary to, the exercise of their franchises, is based upon the idea that it might be prejudicial to the public interest of that state to allow corporations to become speculators in lands, or to hold them in large amounts, keeping them out of market for an unreasonable time, preventing improvement etc.; *Thompson v. Waters*, 4-458.

84. **TENURE OF REALTY.** Land which a corporation can not hold in its own name, it can not hold in the name of another. When a corporation can not hold the legal title to land it can not take a beneficial interest in it; *Coleman v. San Rafael Tp. Co. et al.*, 5-159.

85. —. The power to acquire and hold real estate is not allowed to private corporations; except under the conditions prescribed by their organic law; *Chapman v. Colby Bros. & Co.*, 7-578.

86. **TO HOLD PROPERTY.** A corporation was authorized, by legislative resolution, in 1796, to build and maintain a toll bridge. The resolution making the grant declared that "for the purpose of carrying this resolve into effect said company have liberty and are hereby authorized to purchase and hold lands not exceeding one hundred acres; and said bridge and all property that shall be vested therein, appurtenant thereto, and belonging to said company, shall be considered and is hereby declared to be personal estate, and shall be divided into sixty shares." Held, (a) that the charter did not grant authority to build and rent wharves; (b) that the long continued exercise by a corporation of powers not granted by its charter does not create such powers by implication; (c) that wharves owned by the company were not personal property within the meaning of the charter; (d) that as to the bridge and the property appurtenant thereto it should be considered personal property only when represented by the shares of capital stock; and that in other respects its character was not changed; (e) that when the statute provided for the taxation of any real estate owned by a private corporation "above what was

required and used for the transaction of its appropriate business" to the same extent as if owned by an individual, such wharves were liable to taxation; *Toll Bridge Co. v. Osborn*, 3-156.

87. **USE WILL NOT STOP EXTENSION.** Where a railroad corporation has procured a right to widen its road bed, as originally constructed, the circumstance of cars having been run over the road so constructed, for some years after obtaining the right, does not estop the company from widening the road; *Childs et al. v. Central Ry. Co.*, 3-568.

88. **LEGISLATIVE RECOGNITION.** The passage of a subsequent act, authorizing a new railroad company to take more land than one hundred feet in width in case of necessity, from excavations or embankments, is a strong legislative recognition of the continuance of the power originally given to have land sequestered for the purposes of the road constructed by the former railroad corporation. *Id.*

89. **LAND FOR SPECULATION.** An agreement by the owner of land to convey, to a railroad company, certain lands, in consideration that the company shall build a freight and passenger depot at a particular place, where the land, so proposed to be conveyed, is to be used for speculative purposes, and not for the general business of locating, constructing, managing and using the road, is against public policy and void, although, in one sense, a railroad company is a private corporation, the public is deeply interested in it. Its chartered privileges and franchises are not granted, solely and exclusively for private benefit and emolument, but to subserve a great public interest; there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain; *Pacific R.R. Co. v. Seely et al.*, 3-529.

90. —. The charter of a railroad corporation gave it power to acquire and hold a strip of land for a right of way, turn outs, embankments or excavations, and to hold sufficient ground for the erection and maintenance of depots, landing places or wharves, engine houses, offices, machine shops, and wood and water stations. Held, that the corporation had no power to acquire land for purposes of speculation. A corporation can purchase and hold land only for such purposes as are authorized by its charter. *Id.*

91. **DISPOSITION OF CORPORATE PROPERTY.** A corporation having power, under the statute under which it is organized, "to receive and hold, by purchase, gift or grant, any real or personal property," and to "sell, mortgage, lease and otherwise use and dispose of such property in such manner as they shall deem most conducive" to the purposes of the corporation, has power to make any disposition of its property by sale or conveyance which, in the opinion of the trustees, acting in good faith, will advance the purpose for which the corporation was organized; *People v. President and Trustees*, 1-161.

92. **EXTENT OF POWER.** All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except in so far as they are restrained by statute. *Id.*

93. **TO SELL PROPERTY.** Equity will not, generally, interfere upon the petition of a general creditor, to restrain a corporation from selling even its entire property to a stockholder or director, where the sale is made with no fraudulent intent, for an adequate price, for the purpose of paying corporate debts, and where no shareholder objects; *Barr v. Bartram & Fantor Manuf. Co. et al.*, 5-188.

94. **POWER TO SELL.** A corporation having power "to purchase, hold, sell and convey such real and personal estate as the purpose of the corporation may require," may sell and convey its entire property; *Miners Ditch Co. v. Zellerbach*, 1-250.

95. **EFFECT OF SALE.** The sale of the entire property of a private corporation held as a natural person holds property, and in the use of which the public has no special interest, does not transfer the franchise or dissolve the corporation. *Id.*

96. **AS TO SALE OF PROPERTY.** A railroad company was authorized, by the terms of its charter, "to lease, rent or sell its said railroad, its appurtenances and franchises to any other incorporated railroad company of this state." It was held, that a sale of the road either in detached portions, or of the iron separately from the remainder of the road, to a party other than an incorporated company of the state, was a violation of the charter, and should be restrained by injunction upon the application of stockholders in the company; *Upton County R.R. Co. et al. v. Sharman et al.*, 1-322.

97. **CONVEYANCE OF REALTY.** A statute providing that a corporation may convey real estate by an agent appointed by vote for that purpose, does not exclude other modes of conveyance, as, for instance, through the regular officers of the corporation; *Morris v. Keil*, 5-487.

98. **RIGHT TO MORTGAGE.** A corporation, being authorized to acquire real property, will be regarded as having power to sell or mortgage the same in the absence of some statutory prohibition; *Aurora Agric. & Horti. So. v. Paddock et al.*, 6-368.

99. —. **Mortgage under a statute authorizing a corporation** — in this case a railway company — to borrow money for certain purposes, to dispose of its bonds for the sum so borrowed, and to mortgage its property and franchises to secure the same, upon the concurrence of the holders of two-thirds in amount of the stock of such corporation, to be expressed at a meeting of stockholders to be called by the directors, who are to give notice etc. A resolution of the directors at a directors' meeting, authorizing and directing the execution of a mortgage for a loan, it being shown that they were the only stockholders except one, and that all the stockholders assented to the making of the mortgage, while not a

literal compliance with the law is a substantial compliance with its spirit, and the mortgage will be held good; *Thomas v. Citizens Horse Ry. Co.*, **9**-189.

100. **RIGHT TO MORTGAGE.** A statute required the concurrence of the holders of two-thirds in amount of the stock of the corporation to the proposition to borrow money and mortgage the corporate property. In such case, whether the stockholders received such a notice of the meeting as the statute requires, is a matter of no importance, if they met and acted upon the question. Their action is as binding as if they had the proper notice. *Id.*

101. **TO CONTRACT.** A corporation can make no valid contract except such as relates to the business and objects of the corporation; and all such contracts must be made either by the board of directors or a duly authorized agent or attorney; *Brooklyn Gravel Road Co. v. Slaughter*, **3**-292.

102. —. A corporation, as an artificial person, is endowed with the capacity to enter into any obligation, or contract, essential for its purposes and for the transaction of its ordinary affairs; *M'Kiernan v. Lenzen*, **6**-264.

103. —. The power to contract existing, it may be exercised by a corporation, or its agent, in the same way that a natural person may contract, unless restrained, by charter, to some particular mode of contracting. *Id.*

104. —. Capacity to contract is an incidental corporate power; limited, only, to such contracts as are necessary and proper to enable the corporation to accomplish the purposes of its creation; *Ala. Gold Life Ins. Co. v. Central Agric. & Mech'l Ass'n*, **6**-108.

105. **VOID CONTRACTS.** The general principle is, that a corporation can make no contracts and do no acts except such as are authorized by its charter. Any contract, made by it, not necessary and proper, directly or indirectly, to enable it to answer the purpose of its creation is void, and not enforceable, at law or in equity. *Id.*

106. **TO INCUR DEBTS AND EXECUTE NOTES.** A corporation organized under the provisions of general statutes of 1866 (chapter 34, title 2) of Minnesota, for the incorporation of manufacturing companies, which adopted, as one of its articles of association, a provision fixing a limit to the amount of indebtedness which might be incurred by the corporation, had power to create debts in the ordinary transaction of its business and to give its negotiable note for such indebtedness; *Auerbach et al. v. La Sueur Mill Co.*, **8**-6.

107. **CONTRACTING AND SECURING DEBTS.** A corporation has implied power to contract debts like an individual, whenever necessary, or convenient, in furtherance of its legitimate objects. Whenever it may contract a debt it may borrow money to pay it. Whenever it contracts a debt, in the scope of its business, or bor-

rows money, it may execute a negotiable bill, note, or bond and secure it by mortgage, to the creditor, in payment; *Ward, receiver, v. Johnson et al.*, **6-462**.

108. **TO BORROW MONEY.** Without authority expressly given by the act of incorporation, a private corporation may borrow money for the legitimate purposes of its creation or organization. As it may borrow money so it may secure the re-payment of the same upon the corporate property, by mortgage or otherwise, as exercising an implied or incidental power. The corporation would be estopped to deny it had authority thus to pledge its property etc., after having received the benefits of the proceeds of the security; *Wood et al. v. Whelen*, **6-442**.

109. —. A corporation, organized not for pecuniary profit, the articles of association of which neither assume the power to borrow money or to execute securities therefor, nor prohibit the doing of these, has, by implication, the power to borrow and secure the payment of moneys for the necessary and proper purpose of carrying out the objects of the corporation; *Thompson et al. v. Lambert et al.*, **6-523**.

110. —. Every private corporation, unless prohibited, may borrow money to carry out the purposes of its creation; *Ala. Gold Life Ins. Co. v. Cent. Agric. & Mech. Ass'n*, **6-108**.

111. —. Corporations, like individuals, may borrow money, for use in the conduct of their affairs, without express authority therefor, when the nature of their business may render it proper or expedient. The power to borrow carries with it, generally, unless expressly restrained, the power to secure the loan made by mortgage. If there be no such express power found in the charter of a corporation, but power is conferred on its directors to make all necessary contracts and to sell, or otherwise dispose of, any portion of its property whenever, in the judgment of its directors, it should be found to be to the interest of the company the exercise of the power to borrow and to secure the loan by mortgage will be valid; *Booth et al. v. Robinson et al.*, **7-419**.

112. **TO EXECUTE NOTE.** A corporation created under general statutes of Minnesota (chapter 34, title 2) may execute promissory notes to evidence debts which it may contract; *Sullivan et al. v. Murphy et al.*, **7-606**.

113. **BORROWING.** In order to borrow money and mortgage the franchises and property of a corporation to secure its re-payment, special authority is necessary; because these are not incidents of the charter; *Pittsburg & Connellsville R.R. Co. v. County of Allegheny*, **4-92**.

114. **AS TO NEGOTIABLE PAPER.** Manufacturing and other like corporations in Alabama may, unless expressly prohibited by their charters, borrow money and make and receive promissory notes and bills of exchange, in carrying on their lawful business; *Oxford Iron Co. v. Spradley*, **4-272**.

115. **PRESUMPTION AS TO NEGOTIABLE PAPER.** The presumption is in favor of the validity of notes and bills of exchange made by manufacturing and other like corporations of Alabama, as well as that they are made in the lawful course of their business, until the contrary is shown. *Id.*

116. **BILLS OF EXCHANGE.** A corporation, having the, ordinarily granted, authority to contract and be contracted with, has the power to execute bills of exchange. Its directors, unless expressly prohibited by charter, may therefore confer authority upon its agent to draw and execute bills of exchange on behalf of the company. This may be done without any formal action, in writing, on the part of the board of directors; *Preston v. Missouri & Pennsylvania Lead Co.*, 4-514.

117. **PROMISSORY NOTE VOID.** A promissory note executed by an iron company for money, or other thing, loaned to it, to be used by the company in erecting iron works, and making iron for the late confederate government, for military purposes in carrying on the late rebellion against the United States, if known to the lender at the time of the loan, is against public policy and illegal, and no action can be maintained on it; *Oxford Iron Co. v. Spradley*, 4-272.

118. **BORROWING MONEY.** A corporation has power to borrow money and give a mortgage to pay its floating indebtedness, and enable it to carry on business; *Hopson v. Aetna Axle & Spring Co.*, 10-97.

119. —. The directors may guarantee the payment of such indebtedness; and the company, having used the money in paying its debts, can not be heard to say that the mortgage is invalid. *Id.*

120. **BORROWING FROM OFFICER.** Under statute of Indiana (Rev. Stat., 1881, § 3653) a turnpike company is authorized to borrow money of any officer of the company, for use in making its road; and, it may execute a promissory note therefor; *Lebanon etc. Gravel Road Co. v. Adair*, 9-259.

121. **VIOLATION OF STATUTE.** A statutory provision which forbids a corporation to contract debts or incur liabilities exceeding one-half of its capital stock actually paid in and unimpaired and its other property and assets, is directory. Debts contracted and liabilities incurred in excess of that amount are binding upon the corporation. The contracting of such debts is not the exercise of a power not conferred upon the corporation; but, merely the abuse of the given power in particular instances, of which abuse third parties can not, ordinarily, be presumed to have had knowledge; *Ossipee Hosiery & Woolen Manuf. Co. v. Canney*, 5-532.

122. **USURIOUS CONTRACT.** The directors and shareholders of a corporation are the agents and quasi trustees of the corporation; wherefore, they have no power or authority, in the absence of express words of the charter, to make an illegal usurious contract

which shall bind the corporation, or its assets; *Planters Warehouse Co. et al. v. Johnson, exec'r, et al.*, 7-15.

123. **TO MAKE ASSIGNMENT.** A corporation may make an assignment, which is a contract of transfer or sale. It may make such assignment by an agent; *M'Kiernan v. Lenzen*, 6-264.

124. **GENERAL ASSIGNMENT.** It is well settled law that, in the absence of any restriction, by charter or by general law, a corporation may execute an assignment of its property for the benefit of its creditors. Such an assignment may be made by the board of directors, without the express authority, or consent, of the stockholders; *De Camp et al. v. Alward*, 7-76.

125. **JOINT OBLIGATION WITH INDIVIDUAL.** Where an association of persons employ an individual, to render services for them, a third party, not a member of the association, may become bound with the company; *Boyd v. Merriell*, 3-260.

126. **ELECTION OF MEMBERS.** The power to elect members is incidental in the corporate body, and such power need not be expressed in the statute under which the corporation organizes, but, where the power is limited, it can not be exceeded; *Diligent Fire Co. v. Commonwealth*, 5-613.

127. **LIMITATION OF MEMBERSHIP.** The charter of a corporation provided it should consist of not more than one hundred active members, and might bestow honorary membership on active members as they might think proper. The corporation could not create honorary members except from active members. *Id.*

128. —. A by-law authorizing the election of contributing members, in the same manner as active members, held void. *Id.*

129. **TO EXPEL MEMBERS.** Such a corporation may provide by by-law for the expulsion of members, but it is not invested with arbitrary power or uncontrollable discretion. When a proper case is made the courts will construe a by-law made within the power of the corporation, and investigate the legality of action taken under it; *State, ex rel., v. Ga. Med. Soc.*, 1-328.

130. —. When a corporation is duly organized it has power to make by-laws and expel members, though the charter is silent upon the subject; *Dickenson v. Chamber of Comm.*, 4-229.

131. —. If the power to expel members from a corporation be expressly granted in general terms, it is conferred to enable the corporation to accomplish the objects of its creation and is limited to such objects or purposes. It appears to be well settled, that when the charter of a corporation is silent upon the subject of expulsion, or grants the power in general terms, there are but three legal causes of disfranchisement: 1. Offenses of an infamous character indictable at common law. 2. Offenses against the corporation's duty to the corporation, as a member of it. 3. Offenses compounded of the two. *Id.*

132. **EXERCISE OF CORPORATE RIGHTS.** A corporation may do business for another person, and in that sense become a broker;

but, it does not become a broker by transacting, for itself, such business as its charter authorizes it to do; *Henderson et al. v. State of Indiana*, 7-45.

133. **RIGHT TO SUE.** If it be assumed that until the filing of a certain certificate, as an act precedent to the doing of business as a corporation, the corporation has not the power to sue or to transact business, it does not follow it can not maintain an action for goods it owned and has sold or consigned for sale on its account prior to such filing. Upon filing the requisite certificate the title to the goods sold, or consigned, or the proceeds thereof, would at once vest in the corporation and it would acquire the right to maintain suit for them; *Augur Steel Axle etc. Co. v. Whittier*, 7-443.

134. **TO ARBITRATE.** A corporation which is empowered to sue and be sued, plead and be impleaded, appear in court, defend and prosecute to final judgment and execution has power to submit a demand made against it to arbitration, authorized by statute, for the adjustment of controversies; *Morville v. American Tract Soc.*, 7-473.

135. **COMPROMISE OF SUIT.** The president and directors of a corporation, having the power to institute an action, have the power to dismiss it; *Shawhan etc. v. Zinn etc.*, 7-186.

136. **EXERCISE OF.** A corporation which, by its charter, can only act through its board of directors, can not be bound to contracts by its president, without the authorization of the board; unless it be in acts of simple administration which, of necessity, should be done without that authorization; *Bright v. Metarie Cemetery Ass'n*, 7-260.

137. —. By the articles of incorporation, of a corporation, formed under general law, the government thereof and the management of its affairs was vested in the board of directors. The legal effect of this is to invest the directors with such government as a board, and not otherwise. The general rule is, that the governing body, as such, of a corporation are agents of the corporation only as a board and not individually. They have no authority to act for the corporation, save when assembled at the board meeting. The separate action, individually, of the persons composing such governing body, is not the action of the constituted body clothed with the corporate powers; *Baldwin et al. v. Canfield*, 7-641.

138. **DELEGATION OF.** Where by vote of the corporation it is resolved "that the president have the full power and control of all the business of the company," and he exercises the delegated authority, this will authorize him to execute and issue negotiable paper for money borrowed about the business; *Castle v. Belfast Foundry Co.*, 7-340.

139. **RATIFICATION OF EXERCISE.** The action of two of three directors in ratifying and confirming the acts of one of the two will be binding on the corporation; albeit the third may be deceased or have resigned. *Id.*

140. **EXTRA-TERRITORIAL EXERCISE OF.** A corporation created by and existing under the laws of one state, may transact business and have places of business elsewhere, unless prohibited by its charter or by local law ; *Nat'l Bank of Commerce v. Huntington et al.*, 7-524.

141. —. A corporation may exercise its franchises extra-territorially, only so far as it may be permitted by the policy or comity of other sovereignties ; *City of St. Louis v. Wiggins Ferry Co.*, 3-79.

142. —. A corporation, as such, does not exist out of the jurisdiction which charters it. But, a corporation may, by its agents, make contracts and sue and be sued, out of the jurisdiction which gave it birth ; provided there be nothing in the charter, or in the nature of its powers, to contravene ; *Wood Hydr. Hose Mining Co. v. King*, 4-344.

143. **PRESUMPTION AS TO EXERCISE OF.** In harmony with the general law of comity, among the states composing the nation, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any other state the general power conferred by its own charter, unless it is prohibited from so doing, either by the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court ; *Christian Union v. Yount*, 6-69.

144. **EXTRA-TERRITORIAL EXERCISE OF.** Although generally a corporation must dwell in the state under whose laws it was created, its existence, as an artificial person, may be acknowledged and recognized in other states. Its residence in one state creates no insuperable objection to its power of contracting in another. *Id.*

145. —. The directors of a corporation, unless forbidden by its charter or the general laws of the state from which it derives existence, may perform all except strictly corporate acts outside of the limits of such state, as within them ; *Bassett v. Monte Christo Gold & Silver Mining Co. et al.*, 8-356.

146. **ULTRA VIRES.** The term *ultra vires* is used in two senses. 'An act is *ultra vires* when beyond the scope of the powers of the corporation under any circumstances. An act may also be *ultra vires* with reference to the rights of certain persons, when without their consent, or with reference to some specific purpose as to which it is prohibited, though fully within the scope of the general powers of the corporation, or its powers for some other purpose. *Miners Ditch Co. v. Zellerbach et al.*, 1-250.

147. —. The test, as between strangers who have no actual notice and the corporation, is to so compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract can not be enforced ; otherwise it can. *Id.*

148. **BEFORE STOCK SUBSCRIBED.** Neither a railroad corporation, organized under the general act, of Illinois, of March 1, 1872, nor its charter directors, can do other acts than such as are necessary to set the association in motion as a corporation, until the whole number of shares of its capital stock, as fixed by its articles of association, have been subscribed. Until that is done no contracts can be made, nor can any liability be incurred for the construction of the contemplated road, in which one of them may have had a pecuniary interest as a stockholder; *Allman v. Havana, Rantoul & Eastern R.R. Co.*, 6-415.

149. —. Where a railroad company was attempted to be formed under the general railroad incorporation law of Illinois, of March 1, 1872, and its capital stock was fixed at \$1,000,000, by its articles of association, the number of shares being 10,000, of \$100 each, it was held the corporation could have no legal existence until the entire amount had been subscribed; and that, prior to the happening of that event, the directors could make no assessment, or call, on the shares of those who had subscribed. *Id.*

150. **EXCESS IN EXERCISE OF.** Excess in the exercise of power by a corporation is to be redressed by the commonwealth and not by volunteers who may choose to interfere; *Pittsb. & Conn. R.R. Co. v. Allegheny Co.*, 4-92.

151. **REALTY HELD IN EXCESS OF LIMITATION.** It is matter of no concern to the individual litigant that a corporation has acquired, or is holding, more real estate than its charter authorizes. The matter can be raised and proceeded upon only by authority and in the name of the state; *Christian Un. v. Yount*, 6-69.

152. **INDEBTEDNESS IN EXCESS OF LIMITATION.** Where a private corporation has authority to issue negotiable paper, such paper, when issued, possesses the legal character ordinarily attaching to commercial paper; and, a holder in good faith, before maturity and for value, may recover, although, in this particular case, the power of the corporation was irregularly exercised or was exceeded; *Auerbach v. La Sueur Mill Co.*, 8-6.

153. **WHO MAY NOT QUESTION THE EXERCISE OF.** The purchaser, at a judicial sale, of real estate, of a private corporation, who is neither a stockholder nor creditor, can not question the power of the corporation to make a prior deed of trust upon the property by him so purchased and have the same set aside in his favor, he having, at the time of purchase, notice of the incumbrance and the company having been guilty of no fraud; *Darst v. Gale et al.*, 6-380.

154. **DEFECT OF.** A corporation, organized under general law of a state, can not subject itself, or its members, to the jurisdiction or control of an authority existing out of the state of its creation and which is not subject to the jurisdiction of domestic law; *Lamphere v. Grand Lodge A. O. U. W.*, 7-595.

155. —. The powers of a railroad company do not extend

to its becoming a stockholder in other railroad companies, and a court of equity will, at the instance of stockholders, enjoin a purchase of stock by such corporation; *Central R.R. Co. et al. v. Collins et al.*, **3**-224.

156. **ACQUIRING STOCK OF OTHER CORPORATIONS.** A corporation may invest in the stock of other corporations, as well as in other funds; provided it be done in good faith and with no sinister or unlawful purpose and there is nothing in its character or the nature of its business forbidding such investment; *Booth et al. v. Robinson et al.*, **7**-419.

157. **MISAPPROPRIATION OF PROPERTY.** A railroad company having purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors, who were in the interest of the railroad company, and then with the assent of such board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed by the directors of the two companies, but which was far below the actual value of the property; held, that, although the stockholders and creditors of the canal company can not, after the road has been completed, reclaim the property or enjoin its use, yet they are not concluded by such agreement, so far as regards the price of the property, but may, by action, compel the railroad company to account for its additional value; *Goodin v. Cincinnati etc. Canal Co. et al.*, **3**-652.

158. **MEASURE OF DAMAGE.** The rule of valuation in such cases is, what the interests of the canal company was worth, not for canal purposes merely, or for any other particular use, but what it was worth generally — for any and all uses for which it might be suitable. *Id.*

159. **OF NATIONAL BANK; PURCHASE OF COIN.** The national bank act of 1864, authorized the banks erected under it to buy and sell coin. Banks holding coin in pledge may sell and assign its special property, and such an assignment vests the legal title of the assignor; *Merchants Nat. Bk. v. State Nat. Bk.*, **3**-25.

160. **CERTIFICATES OF DEPOSIT.** A corporation authorized by its act to receive deposits on trust, but prohibited to "make or issue any bills, bonds, notes or other securities to circulate in the community as money," may issue certificates of deposit; *Talladega Ins. Co. v. Landers*, **3**-102.

161. **CONSTRUED.** An express grant of power, in a charter, to a corporation, to fix the rates of tolls to be charged, as for transportation by a railway, and to alter and change such rates, does not confer unlimited power; but, only the right to charge reasonable rates, and what is a reasonable rate may be fixed by statute; *Ruggles v. People of State of Illinois*, **6**-428.

162. **CONSTRUED.** The power to build bridges or make any other work necessary for the construction, use or enjoyment of a railroad, implies only that the company can make such works on

the line which they may take by condemnation ; *State v. Hancock*, **3**-566.

163. **NON USER.** A mere non user of all corporate powers is not a concealment of the corporation, such as to suspend the running of the statute of limitations ; *City of Fort Scott v. Schulenberg et al.*, **7**-156.

164. **REMOVAL.** Corporations can not remove from place to place, or establish branches for the transaction of their regular corporate business, unless authorized by law ; *Chapman v. Colby Bros. & Co.*, **7**-578.

See, also, **AGENCY ; BANK AND BANKING , CONTRACT ; DIRECTORS ; FOREIGN CORPORATION ; NATIONAL BANK ; OFFICES AND OFFICERS ; ULTRA VIRES.**

PRACTICE.

1. **CAPACITY TO SUE.** The rule that the question of the plaintiff's capacity to sue must be raised either by demurrer or answer, and, if not so raised is to be deemed waived, applies to all cases where the plaintiff, though having an interest in the subject of the suit and the relief demanded, does not show a right to appear in court and demand such relief in his own name ; as in the case of a stockholder in a corporation suing directors of the corporation for a fraudulent breach of trust in dealing with the corporate property ; *Bulkley v. Big Muddy Iron Co. et al.*, **9**-533.

2. **APPEARANCE.** A corporation, like a natural person, may appear voluntarily by attorney ; such appearance gives jurisdiction to the same extent as if there were actual service of process ; *Attorney General v. Guardian Mut. L. Ins. Co.*, **8**-609.

3. **SERVICE OF PROCESS.** A foreign corporation not having an agency established, in the state of Minnesota, for the transaction of any portion of its business and upon whose property plaintiff has not acquired a lien, by attachment or garnishment, may be subjected to the jurisdiction of the courts of the state by service on its president, secretary or any managing or general agent found within the state ; *Guernsey v. Amer. Ins. Co.*, **3**-490.

4. — ; **ACCEPTANCE.** In a suit against a corporation, any officer, agent or employe thereof, on whom the summons and complaint may be executed, is competent to accept the service ; *Talladega Ins. Co. v. Woodward*, **3**-116.

5. **APPEARANCE WAIVES NO RIGHTS.** By subjecting itself to the provisions of a state statute requiring it to maintain an office in the state where process of the state courts may be served on it, a corporation makes no contract divesting itself of its rights of a citizen of a foreign state, nor does it waive any right which as a foreign citizen it may have under an act of the congress of the United States ; neither does it waive such right by appearing to answer in a suit brought, nor, after application for removal has

been made according to the act of congress and refused, by going to trial and judgment; *Herryford v. Aetna Ins. Co.*, 3-511.

6. **APPEARANCE IRREGULARLY ENTERED.** An appearance irregularly entered by defendant's attorney will not be allowed to be withdrawn when the cause is called for trial, if objected to, and if such withdrawal will have the effect to prejudice the plaintiff. The irregularity will be held to be the fault of the party's attorneys, who made the irregular appearance, and they will not, at that stage of the case, be permitted to withdraw it, and thus take advantage of their own fault to the injury of the plaintiff; *Talladega Ins. Co. v. Landers*, 3-102, note 1.

7. **POWER OF COURT.** The chancellor has the power to require an election of directors, upon the presentation of a proper case; *Orr v. Bracken County*, 10-449.

8. **INJUNCTIONS.** An injunction will lie at the suit of a corporator to present the misappropriation of corporate property. In such actions the corporation is a proper party; *Tipton Fire Ins. Co. v. Barnheisel*, 10-307.

9. **TO STAY WASTE.** When the purpose of the action is only to stay waste and to preserve the corporate property, no useful end could be subserved by making the corporation a party; *Parrott et al. v. Byers et al.*, 4-282.

10. **WINDING UP.** The statute of Tennessee requires that a bill filed by creditors of a corporation, in the process of winding up, praying for distribution of the proceeds of its property, shall be filed by the complaining creditor, for himself and other creditors. A defect in this particular is cured by an order in the final decree directing that notice be given to such other creditors to come in and present their debts; *Moss v. Harpeth Academy*, 4-188.

11. **DEFENSE AT LAW, NEGLECT.** If a party has the means of defense to an action at law in his power, and neglects to employ them, and suffers a recovery to be had against him, a court of equity will not grant him relief against the judgment unless he shows he was prevented by fraud or improper act of the plaintiff in making his defense at law; *Galena & S. W. R.R. Co. v. Ennor*, 10-285.

12. —. The fact that there was false testimony given on the trial, or false representations or assertions as to defendant's liability previously made, is no ground in equity for setting aside a judgment at law, nor will the failure of the plaintiff to produce written evidence on the trial, and the giving parol evidence where inadmissible if objected to, amount to a fraud on the defendant in the judgment as to the fact the written evidence would have shown. *Id.*

13. **BILL TO COMPEL PAYMENT OF SUBSCRIPTION.** On a bill filed to enforce the liability of a stockholder for his unpaid stock, the corporation, if existing, or if it has ceased to exist, all its stockholders and creditors, are indispensable parties and should be before

the court so that complete justice may be done to all, and all conflicting rights and equities finally adjusted; *Patterson v. Lynde*, **10-239**.

14. **BILL TO COMPEL PAYMENT OF SUBSCRIPTION.** On a bill filed in the courts of this state by creditors of an insolvent corporation of the state of Oregon against the corporation, alleging its insolvency and their inability to obtain a judgment at law in this state, and also that the defendant owed large sums on their subscriptions to the capital stock of the company, and seeking a decree against them for the same, to satisfy complainant's judgment, held, that a demurrer to the bill was properly sustained for the reason of its being impossible to acquire jurisdiction of the corporation, the non resident stockholders having no property here. *Id.*

15. **BILL AND CROSS BILL.** Where a mutual insurance company filed a bill in equity, alleging that a large surplus fund had accumulated; that this fund had become amply sufficient, and was in danger of becoming too large; that certain questions had arisen concerning it, and the interest arising from it, and praying an interpretation of the charter, and that the legal status of said fund be determined so that it might be ascertained who were its lawful owners, such bill brought the reserve fund before the court, and cross bills setting up rights or claims as to the fund, were germane to the litigation and not demurrable; *Carlton v. Southern Mut. Ins. Co.*, **10-171**.

16. **TRUSTEE AS PARTY.** If a cestui que trust bring a suit against a third person to whom the trustee has assigned property in violation of the trust, the trustee should be made a party, for he is ultimately bound for the due fulfilment of the trust; *Covington & Lexington R.R. Co. v. Bowler's heirs et al.*, **4-404**.

17. **PARTIES.** On a bill by one trustee of a church against his co-trustees to obtain the cancellation of a sale of real estate of the society made by such co-trustees, the corporation should be complainant, or at least a party to the suit; *Cicotte v. Anciaux*, **10-629**.

18. **SUING AS A CLASS.** When defendants are brought in to court as a class on account of numbers, they may defend in the same manner, and if a cross bill is a legitimate mode of defense, it may be filed by them as a class; *Carlton v. Southern Mut. Ins. Co.*, **10-171**.

19. **AMENDMENT OF DECLARATION.** In an action at law against individuals as agents, or committee, or trustees of an association, it is proper, for the attainment of justice, that the court shall allow plaintiff to amend his declaration, so as to charge defendants, in their true character, as a corporation, where the original and amended declarations seek the same end—the subjection of certain property to the plaintiff's demand; *Trustees of Prairie Lodge v. Smith*, **8-66**.

20. **PLEA OF NULLITY OF CORPORATION.** The plea of nullity of

corporation does not impose upon the plaintiff proof that it was in all respects a perfectly legal corporation. On the issue presented by that plea, plaintiff is entitled to recover on making a proof that it had a de facto existence. The execution of the instrument upon which the suit is brought is sufficient prima facie evidence of its existence as a corporation and no further proof is necessary until rebutted by the defendant; *Hudson v. Green Hill Seminary*, 10-259.

21. PROOF OF CORPORATE EXISTENCE. In an action for division of the property of a defunct corporation, as against corporators, it is not necessary to prove a regular corporate organization; *Tipton Fire Ins. Co. v. Barnheisel*, 10-307.

22. SETTING ASIDE DEFAULT. A default should not be set aside, if the service has been regular, without affidavits of excusable neglect, or inadvertence, and, also, of merits; *Lamb v. Gaston & Simpson Gold & Sil. Min. Co.*, 8-300.

23. EXCEPTIONS. When the bill of exceptions does not purport to contain all the evidence, the court will not consider objections relating to the admission of testimony; *Fasnacht v. German Association*, 10-330.

24. BILL OF EXCEPTIONS. It is a well settled rule of practice, of the supreme court of Indiana, that where time is given extending beyond the term of the trial court, in which to file bills of exceptions, they must be filed within the time limited or they will constitute no part of the record. A bill of exceptions is no part of the record unless the record shows when it was filed; *Port et al. v. Russell et al.*, 4-381.

25. REMOVAL OF CAUSES. In the absence of authority, shown of record, to make the affidavit required by the act of congress of March 2, 1867, for the removal of a cause from state to federal jurisdiction, the court will not presume that the secretary of a corporation has been authorized to make such affidavit for the corporation; *Dodge, adm'r etc., v. North Western Union Packet Co.*, 3-502.

26. —. On an application to remove a cause from state to federal jurisdiction nothing must be left to intendment or inference. There must be a clear showing, by the record, that the law authorizing the change has been complied with. *Id.*

27. LOST PAPERS. In Alabama, when a cause is called for trial, if the summons and complaint are lost, plaintiff will be permitted to substitute them on the best evidence that can be adduced (if such evidence is satisfactory to the court), of the former existence and contents of the originals; *Talladega Ins. Co. v. Landers*, 3-102, note 1.

28. IN U. S. SUPREME COURT. This court can not examine evidence, to ascertain whether a jury was justified in finding as it did upon issues of fact; *Express Co. v. Ware*, 5-72.

29. **WRIT OF ERROR.** Under the provisions of the practice act of Illinois, any one or two, or more parties, to a suit, either at law, or in equity, may sue out a writ of error to have reviewed the propriety of any final decree or judgment; *St. Louis & Sandoval Coal & Mining Co. v. Edwards et al.*, 9-169.

30. **STATUTE OF INDIANA.** No question involving the power of the common council of a city to make a contract for street improvement, under an order to that effect, can be made an appeal from a precept; *Hallencamp v. City of Lafayette*, 2-225.

PRE-EMPTION OF PUBLIC LANDS.

1. **WITHIN LIMITS OF CORPORATE TOWN.** Public lands included within the limits of an incorporated town are not subject to entry under the pre-emption laws of the United States; *Root v. Shields*, 2-15.

2. **ORGANIC ACT, NEBRASKA.** The provisions of the act of congress of September 4, 1841, relating to pre-emptions, are not repealed by the provisions of the organic act, prohibiting the territorial legislature of Nebraska from interfering with the primary disposal of the soil. *Id.*

3. **STATUTE CONSTRUED.** The extent of land which may be included within the limits of a city is not limited by the act of May 23, 1844, authorizing the corporate authorities to pre-empt three hundred and twenty acres of the town site. *Id.*

PREFERRED STOCK.

1. **STOCK TO BE EQUAL.** Upon the purchase of stock of a corporation and the issue, to the purchaser, of a certificate therefor, he acquires a vested right. Any action of the corporation which divides the shares of its stock sold and in the hands of lawful owners into classes and gives to one class a preference over the other in sharing in the earnings of the company materially and injuriously affects the rights of the owners of the latter class and, if without their assent or acquiescence, is unlawful; *Kent v. Quicksilver Mining Co. et al.*, 8-613.

2. **ISSUE WITH PRIVILEGE.** The issue of preferred stock, with the privilege annexed that stockholders may subscribe for and take it on the payment of a stipulated sum per share, can not be considered as an executory contract. *Id.*

3. **MAJORITY CAN NOT BIND TO.** There is no power in a corporation — or in the majority of the stockholders — to provide for the creation of a preferred stock, so as to bind the minority of the stockholders not assenting thereto or acquiescing therein. *Id.*

4. **INJUNCTION.** A holder of common stock has a right, in equity, to restrain a privileged payment, to a preferred stockholder, from the profits of the corporation and to have the contract therefor declared illegal. It is, however, his duty to be

prompt in his application for relief, before innocent third persons can be injured. *Id.*

5. **LEGISLATURE MAY AUTHORIZE; TO BORROW MONEY.** The legislature of a state may, constitutionally, empower a corporation of its creation to borrow money by mortgaging its property and franchises, or by issuing preferred stock and pledging its revenues for the payment of dividends thereon, where such course is necessary to carry into effect the object for which the corporation was created. Even if the grant of power to make such pledge of the revenue was regarded as unconstitutional, after the payment of money on such pledge, chancery would scarcely refuse its aid in enforcing its collection by subjecting the property of the corporation to the payment of the loan; *City of Covington v. Covington & Cincinnati Bridge Co.*, 5-388.

6. **GUARANTY INDORSED.** Where there is indorsed upon stock certificates, a guaranty, as "five per cent. semi-annual dividend guaranteed" from a date fixed, signed by the treasurer, it will not be construed as a guaranty to pay at all events, but, only to pay dividends, from earnings, in preference to stockholders holding common stock; *Lockhart v. Van Alstyne*, 5-470.

See **STOCK AND STOCKHOLDERS**, 70-80.

PRESIDENT; see **OFFICES AND OFFICERS**.

PRESUMPTIONS.

1. **APPLICABLE TO CORPORATIONS.** Generally the presumptions applicable to individuals apply to corporations. In this case, the court applied the presumption of rightfulness of the act to a general assignment for the equal benefit of creditors, executed after the term of directors had expired, the assignment being under the corporate seal, executed by persons by designation of office as required by its charter, in the name of a bank, where the assignee had accepted the trust and since had possession of the assets, openly exercising his duties and powers, in the absence of evidence to overcome the validity of the assignment; *Thorington v. Gould*, 6-147.

2. **COMPLIANCE WITH STATUTE.** It is the presumption of the law that a corporation has complied with all conditions imposed by statute. This presumption prevails until the contrary is shown; *Chase v. Lord et al., exec's etc.*, 8-575.

3. **TWO CORPORATIONS WITH LIKE NAMES.** Plaintiff sued a corporation as being organized under the laws of Missouri. The defense set up was that its managing officers, at the time of the making of the contract declared on, were acting in behalf of a foreign corporation bearing the same name. The court held that plaintiff had a right to presume that the company was lawfully acting here in pursuance of authority derived from the local

statute; especially as the same persons were the managers of both corporations; *Dean v. La Motte Lead Co.*, 8-138.

4. **AS TO INCORPORATORS.** Where the incorporators of a town company, who sign and acknowledge the charter thereof, designate themselves, in the charter, as citizens of Greenwood county, state of Kansas, and, further, state in the charter that they are all of Salt Springs, Greenwood county, Kansas, and also state in the charter the object of the corporation to be for the purpose of purchasing, locating and laying out a town site, and the sale and conveyance of the same in lots, sub-divisions, or otherwise, and afterward the charter is filed with the secretary of state; and, afterward, S., who was one of the incorporators, and who signed and acknowledged the charter, conveyed a piece of land to the town company, and there is no evidence tending to show that the persons who signed and acknowledged the charter were not citizens of the state of Kansas, or that the corporation was not fully and completely organized; it was held, as against S., it will be presumed that the corporate members were citizens of the state of Kansas, and that the corporation was fully and completely organized; *Sword v. Wickersham*, 9-356.

See Particular titles.

PRINCIPAL AND AGENT; see **AGENCY**.

PROCESS.

1. **POWER TO PRESCRIBE.** The legislature has authority to provide for and authorize the service of process, issued against a foreign corporation, upon its agent; *Hiller v. Burlington & Mo. River R.R. Co.*, 8-502.

2. **LEGISLATIVE PREROGATIVE.** It is for the legislature to determine what shall be a sufficient service of process, for the commencement of an action; subject only to the limitation that the service must be such as may reasonably be expected to give the party proceeded against notice; *Pope et al. v. Terre Haute Car & Manuf. Co.*, 9-602.

3. **GENERAL RULE.** As a general rule, any service will be deemed sufficient which renders it reasonably probable that the party proceeded against will be apprised of the action against him and have an opportunity to defend. So long as this general rule is not violated, by a mode of service prescribed by the legislature, no constitutional right of the party served is invaded; *Hiller v. Burl. & Mo. L. R.R. Co.*, 8-502.

4. **UNDER STATUTE OF ILLINOIS.** Under the act of the legislature of Illinois, of 1853, in relation to the service of process upon incorporated companies, in order that a return of service upon an agent may be held good, the return must show that the president of the company did not reside in, or was absent from, the county; *St. Louis, A. & T. H. R.R. Co. v. Dorsey*, 1-417.

5. **SERVICE OF.** It being provided by statute (in the state of Illinois) that an incorporated company may be served with process, by leaving a copy thereof with its president etc., it is sufficient to return: "served this writ on the within named company (naming it) by reading and delivering a copy thereof to Albert Felsenthal, president of said company, this" etc.; *Rock Valley Paper Co. v. Nixon et al.*, **6-392**.

6. —. In Michigan, process can be served on a manufacturing corporation organized under general law, only in the county in which its business office is fixed; *Dewey v. Central Car Manuf. Co.*, **6-642**.

7. —. A statute (Wag. Stat., Mo., 29, §§ 26-7) provided for service of process on a corporation by delivery on the president or other chief officer of such company, or, in his absence, by leaving a copy thereof at any business office of the company with the person having charge thereof, and that on the return of such summons, served as aforesaid, the officer serving the same shall express in his return on whom, how and when the same, has been executed and if not on the chief officer, he shall express the absence of such officer or that he can not be found. The return of service made by leaving a copy at such business office, in order to be valid must recite that the chief officer is absent from, or can not be found in, the county and not merely and generally that he is absent; the proper inference from the latter recital is that he was absent from his office; *Hoen v. Atlantic & Pacific R.R. Co.*, **8-157**.

8. —. A foreign corporation not having an agency established, in the state of Minnesota, for the transaction of any portion of its business and upon whose property plaintiff has not acquired a lien, by attachment or garnishment, may be subjected to the jurisdiction of the courts of the state by service on its president, secretary or any managing or general agent found within the state; *Guernsey v. American Ins. Co.*, **3-490**.

9. —; **ACCEPTANCE.** In a suit against a corporation, any officer, agent or employe thereof, on whom the summons and complaint may be executed, is competent to accept the service; *Talladega Ins. Co. v. Woodward*, **3-116**.

10. **APPEARANCE.** By subjecting itself to the provisions of a state statute requiring it to maintain an office in the state where process of the state courts may be served on it, a corporation makes no contract divesting itself of its rights of a citizen of a foreign state, nor does it waive any right which as a foreign citizen it may have under an act of the congress of the United States; neither does it waive such right by appearing to answer in a suit brought, nor, after application for removal has been made according to the act of congress and refused, by going to trial and judgment; *Herryford v. Aetna Ins. Co.*, **3-511**.

11. **SERVICE.** Where a corporation appears generally and pleads to the merits in an action, the subject matter of which is within

the jurisdiction of the court, it can not, as defendant, afterward interpose any objection to the jurisdiction of the court, over its person, based on defects in the service of the summons; *Anderson v. Southern Minn. R.R. Co.*, 7-599.

12. SERVICE; NOTICE OF INJUNCTION. A person who has been designated by the corporation, as required by statute, as an agent upon whom process against such corporation may be served, is a proper party upon whom to serve notice of an injunction against such corporation; *Eureka Lake etc. Co. v. Superior Court*, 10-73.

13. —. On a bill by a director of a private corporation and others, stockholders and creditors of the corporation, the only service on the corporation was by leaving a copy of the summons with the complainant director, the return stating "the president, clerk, secretary, superintendent, general agent, cashier and principal of said company not found." The bill alleged that the president and all the other directors and officers of the company were non residents. Held, that the service as to the corporation was void, the director with whom notice was left being a party complainant in the suit, and, the service being void, advantage might be taken of it on error as well as in the trial court; *St. Louis & Sandoval Coal & Mining Co. v. Edwards et al.*, 9-169.

14. SERVICE ON FOREIGN CORPORATION. Any service which would be sufficient as against a domestic corporation may be authorized to commence an action against a foreign corporation; *Pope et al. v. Terre Haute Car & Manuf. Co.*, 9-602.

15. —. Under the provisions of the code of civil procedure of New York (§ 1780), authorizing actions against foreign corporations and providing (§ 492) that personal service of a summons upon such a corporation may be made by delivering a copy thereof, within the state, to the president, secretary or treasurer of the corporation, in order to make that service effectual, it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation, or that it should have any property within the state, or that the cause of action should have arisen therein; and it would seem that a judgment against a foreign corporation, in an action so commenced, will be valid for every purpose within the state, and can be enforced against any of its property, at any time, found within the state. *Id.*

16. DIRECTOR TEMPORARILY IN STATE. Where a foreign corporation has entered into a contract, in an action for services under the contract and for damages for a breach thereof, the cause of action arises in the state, or place, where the principal part of what is contracted to be done is, by its terms, to be performed. The cause of action arising within the state of New York, service of summons in the action upon one of the defendant's directors while temporarily within the state, on his own business, is good service and a sufficient commencement of the suit, although defen-

dant has no property within the state; *Hiller v. Burl. & Mo. River R.R. Co.*, 8-502.

See FOREIGN CORPORATION; MANDAMUS.

PROHIBITION.—WRIT OF.

1. PRACTICE. A proceeding for a writ of prohibition to restrain the court from signing a certificate removing the officers of a corporation, is well brought in the name of the corporation; *Chollar Mining Co. v. Wilson*, 10-67.

2. PETITION FOR WRIT. Under a statute providing for the removal of officers of a corporation, which requires the petition to be signed by a majority of the stockholders, the petition should state the whole number of stockholders, so that the court can determine whether a majority have signed. *Id.*

3. —; MEANING OF MAJORITY. Under such a statute the word "majority" has reference to a majority in numbers of the stockholders, and not in amount of stock held. *Id.*

4. WHEN THE WRIT WILL NOT LIE. A writ of prohibition will not issue to arrest a proceeding at law for defect of parties; as when a suit which should be brought in the name of the state is instituted in the name of a private person; *Bowman's Case*, 8-190.

PROMISSORY NOTE.

1. POWER TO EXECUTE. In the absence of an express authority to make negotiable paper and to issue it, a corporation may do so, for any debt which it may lawfully contract; *Castle v. Belfast Foundry Co.*, 7-340.

2. EXECUTION. Where by articles of association, or incorporation, the business of a corporation is required to be conducted by a board of trustees, or by the officers as such board, the president and secretary of such board have no power, in the absence of a by-law, act, resolution, or custom, to execute a note binding upon the corporation; *Cattron et al. v. First Universalist So. of Manchester*, 6-534.

3. EXECUTED BY OFFICER. It would seem that one who is president, treasurer and a director of a company; who owns three-fourths of its stock; who has charge of its books, solicits and fills orders, has the general management of the company affairs and transacts all its business, may give the company's note for any indebtedness arising in the general management of the business intrusted to him; *Castle v. Belfast Foundry Co.*, 7-340.

4. BETWEEN CORPORATIONS. Where a promissory note is executed by the directors of a corporation, one of such makers being also payee of and indorser upon the note and the president of the corporation and such note is transferred to a second corporation — in this case a bank — of which the payee and indorser is, also, the president, such maker, payee, indorser and president is not in position to consent, for the corporate creditor, to any agreement the

effect of which is to release himself and his co-makers and co-directors from liability on the one hand, or to impair the corporate creditor's security on the other; *Gallery v. Nat. Exchange Bk.*, **6-632**.

5. **INSURANCE PREMIUM NOTE.** A promissory note, made in consideration of a policy of insurance and a part of the same transaction, the policy of insurance being the only consideration for such note, it stands or falls with the policy. If the policy be *ultra vires* — wherefore void — the note fails; *Rochester Ins. Co. v. Martin*, **3-486**.

6. **ACCOMMODATION PAPER.** In Massachusetts the note of a manufacturing corporation in the hands of a holder for value, who took it before maturity and without notice that the maker had not received full consideration, may be enforced against the maker, though a corporation note; *Monument Nat. Bank v. Globe Works*, **3-394**.

7. **CONSIDERATION.** In a suit on a promissory note executed, by defendant to an incorporated university, for a perpetual scholarship therein, the fact that no certificate of such scholarship has been delivered or tendered can not constitute a defense; *President etc. v. Hamilton*, **3-295**.

8. **GIVEN FOR STOCK.** A written obligation for the payment of money imports a consideration; and, upon an issue of want of consideration the burden is upon the defendant. Where persons part with stock, no part of which is paid for, but which has been issued by the company, with the knowledge and assent of payor or payee, the assignor parts with a thing of value; it is erroneous to find there is no consideration for the notes given for the same; *Woodruff v. M'Donald et al.*, **6-193**.

9. **ABANDONED ENTERPRISE.** Where subscribers to the stock of a railroad company had given their notes for the amount of subscriptions, payable when the road should be completed, but, were subsequently induced to take up these notes and to give new ones, payable in four years, in order to enable the company to carry out a contract for the completion of the road and upon the confident, but honest, expression of opinion by its officers, that, if they would do so, the road would be completed under such contract in less than four years, it was held that although the said contract, for building the road was abandoned, before any thing was done under it, by the contractor and the road was never completed, yet the makers of the notes, as subscribers for stock, were liable; *Four Mile Valley Co. v. Bailey et al.*, **3-659**.

10. **PAYABLE TO CORPORATION.** An action may be maintained by a corporation upon a note executed and made payable to the treasurer thereof without giving his name; *M'Broom v. Corporation of Lebanon*, **1-373**.

11. **DISCOUNT — SURETIES.** The discounting of a promissory note for the principal maker at a usurious rate of interest will not

discharge the sureties where there is no intention to practice a fraud on the sureties, or, in the absence of an express agreement between the sureties and the principal, of which the creditor had notice, that the note was not to be used unless it could be discounted at the legal rate of interest. In such case the sureties must be held to have trusted to the judgment and discretion of the principal as to the terms on which the note might be discounted; *Nat. Bank v. Garlinghouse et al.*, 4-38.

12. **LIABILITY ON NOTE SIGNED BY OFFICER.** The question whether one signing a note, or accepting a bill of exchange, as an officer of a corporation means to bind himself personally, is a question of intention between the parties to the instrument, and this intention, as a general rule, must be determined by the face of the paper itself; *Lafin & Rand Power Co. v. Sinsheimer*, 7-392.

13. —. Where one, having authority, accepts a bill in such a manner as manifests an intention not to bind himself; but, to bind a corporation of which he is an officer; and the bill is to be paid out of the funds of the corporation, the acceptance, in such case, will not bind him personally. *Id.*

14. **AMBIGUITY.** Where there is such ambiguity on the face of the paper as to be consistent with either of two constructions, that is that the party signing meant to bind himself, adding his official character merely for the purpose of indicating the character in which he acted, or whether the official character is added for the purpose of showing the party acting performed a mere ministerial act, parol evidence is admissible, to prove the circumstances under which the contract was made; in other words, to prove the nature of the transaction. *Id.*

15. **INSTANCE.** Where a bill of exchange was drawn upon a person in his individual capacity and accepted by him as treasurer of a corporation, and there was such ambiguity, on the face of the paper, as to raise the question whether he meant to bind himself personally, or acted only in an official capacity, parol evidence was admissible, in a suit against him by the payee, to prove the nature of the transaction. *Id.*

15½. **EXTRINSIC EVIDENCE.** A party will not be permitted to show, by oral testimony, that his written agreement, understandingly made, was not, in fact, to be binding on him. It was so held where trustees of a church corporation made a note in their individual names; although they described themselves as trustees of the church, parol evidence was not admissible to show it was the intention of the parties that it was the note of the church corporation and not that of the trustees executing it. The principle of law is that such instruments will be construed as the parties make them, without the aid of extrinsic evidence. There is another rule, however, that where a person signs his name as cashier, or agent, for a corporation, it is the obligation of the corporation and, if the

person who signed, had authority to bind the company he is not liable personally, and the facts may be shown by extrinsic evidence, that it may be known whose obligation it is; *Scanlan v. Keith*, 9-143.

16. **INDORSEMENT OF.** A general statute (Minnesota, 1873, chapter 73, § 89) provides that in actions brought on promissory notes or bills of exchange by the indorsee, the possession of the note or bill shall be prima facie evidence that the same was indorsed by the person by whom it purports to have been indorsed. This rule of the statute applies to indorsements purporting to be made by corporations as well as those purporting to be made by natural persons; *First Nat'l Bank v. Loyhed*, 8-11.

17. **INDORSER; USURY.** An accommodation indorser of a promissory note made by a manufacturing company, for its benefit, can not defend the same on the ground of usury; *Stewart v. Bramhall*, 8-541.

18. —. The statute of New York of 1850 (Laws 1850, ch. 172), prohibiting a corporation from interposing the defense of usury, includes the collateral contracts of individuals as sureties, guarantors or indorsers for the corporation. *Id.*

19. —. The fact that the note was discounted under an arrangement, between the lender and the borrower, that the former would discount if the latter would indorse, does not affect the legal aspect of the question. *Id.*

20. **ALTERATION OF.** Any alteration of a promissory note by a party thereto, without the knowledge of the other parties, however immaterial, will invalidate it as against them; *First Nat. Bk. v. Fricke*, 9-508.

21. **INSTANCE.** One of the makers of a note, who was president of the Odd Fellows Building Association, after a note had been negotiated and without the knowledge of his co-makers, affixed to his name, where it appeared as maker, the abbreviations: "Pres't O. F. B. Ass'n," and where it appeared as payee and indorser, in each place, the abbreviation, "Pres'd't." These were material alterations and invalidated the note as against the other makers. *Id.*

22. **SEALED.** Under the statute of Minnesota, the seal of the corporation affixed to an instrument made by it and which is otherwise a negotiable note, does not impair its negotiability; *Auerbach et al. v. La Sueur Mill Co.*, 8-6.

23. **FORM AND EXECUTION.** In the body of a promissory note, signed by three persons, they were designated as trustees of a corporation, and as such they appeared to promise to pay. To their signatures was appended the words "trustees" etc. Held, that the note did not, on its face, purport to be the note of the persons signing it, so that they might be held personally liable in a suit upon it. This, too, although they showed no authority from the corporation to execute the note, and even, although there

was no such corporation lawfully organized; *Blanchard et al. v. Kaull et al.*, 4-289.

24. FORM AND EXECUTION. A note payable at the office of a corporation and signed in its name, by one who signs as an officer of the company, is a corporate note; and, not the note of the individual signing it; *Castle v. Belfast F. Co.*, 7-340.

25. —. A promissory note reciting that "the trustees of" a church named, "as such trustees, promise to pay" etc., signed by five persons, with the words, "as trustee" etc., after each name, shows, clearly, an undertaking by the corporate body and creates no individual liability; *Little, adm'r, v. Bailey et al.*, 6-413.

26. —. A note in the following words: "Twelve months after date, the president and directors of the Hustonsville and Bradfordsville Turnpike Road Company will pay Le Roy Yowell twelve hundred dollars, for value received, at six per cent. interest from date." Held, the note of the corporation, and not the individual note of the president and directors, whose names were attached thereto; *Yowell v. Dodd et al.*, 1-527.

27. —. Upon a note written, "We the subscribers for the Carmel Cheese Manufacturing Co." etc., and signed by the individual names of members, held, an action can not be maintained against the signers, as it did not purport to be their promise, but the promise of their principal, and if given without authority, the signers might be made liable in another form of action; *Simpson v. Garland*, 10-525.

28. —; NOT OF CORPORATION. A note which reads: "Ninety days after date, without grace, I promise to pay" etc., signed "D. P. Sackett, Pres't Pacific Wool-growers' Co." is not the note of the corporation. It is a promise of the individual, who has signed it, and the words which follow the signature are mere descriptio personæ; *Chamberlain v. Pacific Wool-growing Co.*, 6-255.

29. —. An instrument in these words: "Twelve months after date, the president, by the order of the board of the Houstonsville and Bradfordsville Turnpike Company, promise to pay Mahaly Caphart, three hundred and fifty dollars, with six per cent. interest from date," was the obligation of the president as an individual and not of the corporation; *Caphart v. Dodd et al.*, 1-533.

30. —. A promissory note in usual form, i. e., we promise to pay etc., given for an indebtedness of a corporation and signed by the trustees of the corporation, "G. W., I. B., G. W. F., trustees Perry Lodge, 37, F. & A. M.," is the note of the persons whose names are appended; and parol evidence is not admissible to show that the parties intended and supposed it to be the note of the corporate lodge and agreed that such should be its effect; *Williams et al. v. Second National Bank of Lafayette*, 9-248.

31. **FORM AND EXECUTION.** The makers of a promissory note were described in the body thereof as "we, the trustees of School District No. 20, county of Olmstead," and appended to the individual signatures of the makers was added the word "trustees." Held, that *prima facie* the note was the individual obligation of the makers and not of the district; *Bingham v. Stewart et al.*, 2-559.

32. —. In respect of the particular note in suit, it was considered as apparent on the face of it that it was executed by the signers in their capacity as officers of the corporation — their official character or designation of office and the corporate seal being attached — and no extrinsic facts were necessary to be shown; *Scanlan v. Keith*, 9-143.

33. **USE OF WORD "WE."** Nor need any importance be attached to the use of the words "we" promise to pay, in the body of the note. The word "we" may not improperly be used to denote a corporation aggregate, such as this is, and in the connection in which it is used, in this note, it may more appropriately be regarded as referring to the corporation than the persons, as individuals, who signed the instrument. *Id.*

34. **ACTS OF, NOT BINDING.** Where certain officers of a corporation, having general authority to execute promissory notes for their corporation in proper cases; but, having no authority in the particular case in question, in a transaction having no connection with the corporate business and not authorized by the corporation, and without any consideration moving to the corporation; execute, in the name of the corporation, to a third person who has no actual knowledge of their want of authority, a promissory note for a claim which such third person holds against another and a different corporation, the first mentioned corporation is not liable, on the said note, to the payee thereof, where there has been no subsequent ratification, by the corporation, of the act of its officers; *Ehrgott & Krebs v. The Bridge Manuf. of Topeka*, 7-122.

35. **USURPERS.** After the lawful election of other directors and their organization as a board, a note executed by the old board, still acting as such, but as usurpers, to its president and signed by him, as such, with the other officers, is unauthorized and is not the note of the corporation; *Lebanon etc. G. R. Co. v. Adair*, 9-259.

36. **RATIFICATION.** Notes of the corporation were issued in its corporate name signed by its president, with a corporate seal added. Upon the question of authority to use the corporate seal, it appeared that a committee from the directors was appointed to examine the notes and they reported the signatures genuine, which report was accepted. Held, there was sufficient evidence of a ratification; *Parish of St. James v. Newburyport etc. Horse R.R. Co.*, 10-603.

37. **ACCEPTANCE OF CORPORATE OBLIGATION.** Where a person, in his dealings with a corporation, has accepted a promissory note

for money due him from the corporation, and subsequently, in a suit upon the note against the corporation, as such, recovers judgment, he ought to be for ever thereafter estopped to assert that the note was the individual obligation of the officer executing it on behalf of the corporation; *Scanlan v. Keith*, 9-143.

See AGENCY; CONTRACT; INSURANCE; POWERS.

PROMOTERS.

1. REPRESENTATIONS OF. In the location of the road of a corporation, a promoter of the company can not bind the corporation, subsequently formed. Wherefore, a subscriber having no right to rely on his statements, it is no defense to an action to recover upon the subscription that the road is not laid out as the location was stated to be originally intended; *Miller v. Wild Cat G. R. Co.*, 7-58.

2. —. A representation that one subscribing for stock will not be required to pay the amount of the subscription can not impose on the most unsuspecting. *Id.*

3. —. Parties purchased oil land and, shortly afterward, with others formed a corporation to which the land was conveyed at an advanced price. If in order to get up a company they represented themselves as having acted for the association to be formed and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all others interested, to allow them to retain the profits paid them, by the company, in ignorance of the true sums actually advanced. This is so, also, if they assumed to act without precedent authority, if their doings were accepted as the acts of agents by the association; *Simons et al. v. Vulcan Oil & Mining Co.*, 4-80.

4. SALES BY. Any man, or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost; provided there be no fraudulent misrepresentations made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction; *Densmore Oil Co. v. Densmore et al.*, 4-106.

5. —. Where persons form such an association, or begin, or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company and then sell it at an advance without a full disclosure of the facts. They must account to the company for the benefit, because it legitimately belongs to it. *Id.*

6. **RATIFICATION OF ACTS OF.** Where an act has been done in the name of a corporation which the corporation might lawfully perform, but, which when done there was no authority to do, the board of directors, lawfully in office, may ratify it and such ratification will be equivalent to a precedent authority to do the act so confirmed; *Wood et al. v. Whelen*, 6-442.

7. **CORPORATION MAY ASSUME DEBTS OF.** A corporation may, by express agreement, assume obligations entered into by its promoters prior to its organization, where the corporation receives the benefit of the contract in respect of which such obligations were incurred; *Reichwald v. Commercial Hotel Co.*, 10-203.

8. —; **OBLIGATIONS TO DISCHARGE PRIOR DEBT.** A hotel company was organized with a capital stock of \$160,000 which was all subscribed by one of the corporators except three shares of \$100, none of which was ever paid. At the time of the organization of the corporation, the principal stockholder, who was elected president, was the owner of a large amount of hotel furniture, subject to a chattel mortgage of \$115,000, which he turned over to the company in payment of his subscription, in pursuance of an arrangement prior to the organization of the company, and the corporation, in pursuance of the same arrangement, gave its notes secured by chattel mortgage on the same property, to release it from the prior incumbrance and such property constituted the whole assets of the company. Held, that so far as the hotel company was concerned it received full consideration for the notes and mortgage so given, and they were valid obligations. *Id.*

PROXY; see **BY-LAWS**; **DIRECTORS**; **ELECTION**.

PUBLIC POLICY.

1. **AUTHORITY TO DETERMINE.** The law making power of the state, where the authority is proposed to be exercised, is alone invested with the authority and must determine its public policy. The public policy of the state may be ascertained by reference to the general course of legislation, either by prohibitory or enabling acts, or by its general course of legislation on a given subject. The general course of legislation is to be ascertained by the general laws of the state, and special and private laws, like other exceptions, tend to establish, rather than impair, the force of the general rule; *Carroll v. City of East St. Louis*, 5-208.

2. **RULE OF.** Whenever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy; *Pueblo & Arkansas V. R.R. Co. v. Taylor et al.*, 9-37.

3. **LEGISLATIVE POWER.** It is competent for the legislature to declare all contracts made by a citizen of the state with a foreign corporation — in this case an insurance company — having no right to do business within the state, void. This on the ground

such contract is contrary to the public policy of the state. In furtherance of this same object the legislature may declare it a penal offense on the part of any person within the state, whether acting on behalf of the corporation or with it — as an insurer or one insured — to do any thing, within the state, by way of executing contracts with such foreign corporation, not qualified to do business within the state under the local law; *Pierce v. People*, 9-213.

4. EXERCISE OF CORPORATE FRANCHISES. No state has power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises in other states. It may confer powers in the nature of a commission, to be exercised any where upon condition that their exercise be assented to by the state or sovereignty where it may be sought; but without this assent, express or implied, such powers would be nugatory outside of the state granting them. Each state, by its own legislature, must determine, for itself, all such questions of public policy arising within its own limits; *Thompson v. Waters*, 4-458.

5. MAY EXERCISE POWERS IN ANOTHER STATE. A corporation created in one state may, upon the principle of comity, exercise within another state the general powers conferred by its own charter, and permitted by the law of its own state, provided that the doing so be not inconsistent with the laws or public policy of such other state; *Santa Clara Female Academy v. Sullivan*, 10-298.

6. RULE OF COMITY. The rule seems to be generally and well settled, that the corporate existence, rights of making and enforcing contracts, of acquiring property and transacting business (not requiring the exercise of official corporate action or franchises within the state) of a corporation created by the laws of one state will be recognized and protected in another, subject only to the qualification that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the state in which they are sought to be enjoyed or exercised, or prejudicial to the interests of such state or its citizens; *Thompson v. Waters*, 4-458.

7. —. Upon the principles of comity, the corporations of one state are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the state in to which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn; *Pensacola Tel. Co. v. Western Tel. Co.*, 6-48.

8. VOID CONTRACT. A contract, between two stockholders in a corporation, by which one, in consideration of a sum of money paid to him by the other, agrees to vote for a certain person as manager of the corporation and to vote to increase the salaries of

the officers of the company, including that of the manager, is void, as against public policy, unless it be assented to by all the stockholders of the corporation. Quære, whether it would be valid if so assented to; *Woodruff v. Wentworth*, 9-432.

9. **ILLEGAL CONTRACT.** A contract for the payment of money — in this case a bond — which seeks to, and by its terms does, prevent a neighboring town, through which a railroad passes, from having the facilities it is the duty of the owner of the road to furnish, or which prevents such owner from the exercise of discretion in providing such facilities for the public is illegal and void; *Pueblo etc. R.R. Co. v. Tyler et al.*, 9-37; *St. Louis, J. & Chi. R.R. Co. v. Mathers*, 5-277.

10. —. A contract was made between the president of a railroad corporation, one of its directors and its construction agent, of the one part and two land owners, of the other part, by which the latter were to sell to the first mentioned parties an undivided one-half of 160 acres of land upon these terms; no money was to be paid by the purchasers, but the land was to be laid out in to town lots and sold. The first proceeds of the sale, to the amount of \$4,800, were to be retained by the parties of the first part, as owners, and, when this sum was realized, they were to convey an undivided half of the residue. The consideration for the agreement was, that the parties of the first part should "aid, assist and contribute to the building up of a town on said land." The land was situated upon one railroad and where another road, then in process of construction might, or was expected to cross it. A town was built partly on this tract of land, and a bill was filed for an account of sales and conveyance of a half interest in the unsold lots. The court held the contract to be a bribe on the part of the land owners, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. This, in any point of view, was in violation of the duty of the officials and agents of the corporations, both to stockholders and the public, against public policy and a contract not to be enforced in equity. A cross bill having been filed to cancel the contract as a cloud upon title, it was held that as the land owners had entered into a contract, the effect, or tendency, of which was, to induce complainants to commit a breach of duty, they were entitled to no affirmative relief; *Bestor et al. v. Wathen et al.*, 4-351.

11. **LAND FOR SPECULATION.** An agreement by the owner of land to convey, to a railroad company, certain lands in consideration that the company shall build a freight and passenger depot at a particular place, where the land, so proposed to be conveyed, is to be used for speculative purposes, and not for the general business of locating, constructing, managing and using the road, is against public policy and void, although, in one sense, a railroad company is a private corporation, the public is deeply interested

in it. Its chartered privileges and franchises are not granted, solely and exclusively for private benefit and emolument, but to subserve a great public interest ; there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain ; *Pacific R.R. Co. v. Seely et al.*, **3-529**.

12. **VOID CONTRACT TO PAY.** An agreement by a corporation, to pay interest or dividends on its capital stock, without reference to its ability to pay such from its earnings, is contrary to public policy, and, therefore, void ; *Lockhart v. Van Alstyne*, **5-470**.

13. **LIMITATION OF PAYMENT ON STOCK.** When the charter has fixed the minimum amount of capital stock, the stockholders can not, by their private agreement, abrogate that provision ; any device, by which the members of a corporation seek to avoid the liability which the law imposes on them is void, as to creditors, whether binding or not among themselves. An agreement, in writing, incorporated as part of the contract of subscription, that no assessment should ever be made upon the stock of the company, and that ten dollars on each share subscribed should be the total sum each stockholder should be liable to pay, the par value of the shares being one hundred dollars each, is void as against creditors, as being against public policy and justice. The creditors may enforce the payment of such stock to the extent of their demands, as against the corporation ; *Un. Mut. L. Ins. Co. v. Frear Stone Manuf. Co.*, **6-481**.

14. **PROMISSORY NOTE VOID.** A promissory note executed by an iron company for money, or other thing, loaned to it, to be used by the company in erecting iron works, and making iron for the late confederate government for military purposes in carrying on the late rebellion against the United States, if known to the lender at the time of the loan, is against public policy and illegal, and no action can be maintained on it ; *Oxford Iron Co. v. Spradley*, **4-272**.

15. **CARRIERS.** As common carriers, express companies may reasonably limit their liability by special contract, but public policy will not permit such companies, in this way, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves or servants ; *Southern Expr. Co. v. Crook*, **3-118**.

16. **TELEGRAPH COMPANIES.** A rule adopted by a telegraph company, that it will receive and send messages by night at one-half its usual rates "on condition that the company shall not be liable for errors or delay in the transmission or delivery or for the non delivery of such message, from whatever cause occurring, and shall only be bound in such cases to return the amount paid by the sender," is against public policy and void ; *Bartlett v. W. Un. Tel. Co.*, **5-406**.

17. —. A regulation the design of which is to protect a tele-

graph company from responsibility on account of the gross negligence or fraud of its agents and employes, in the transmission or delivery of a message, which the company undertakes, for a valuable consideration, to send, is against public policy and void; *Candee v. W. Un. Tel. Co.*, **5-633**.

18. IN VIOLATION OF STATUTE. A contract, made by a corporation, which is expressly prohibited from making such a contract, is void so far that the corporation can not maintain an action thereupon. This is so even though the statute does not, in terms, declare that such a contract shall be void, but merely prescribes a penalty for making it. When the legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one means of its prevention, that the courts should hold it void. That the legislature imposed a penalty, for the violation of the provisions of the law, does not, in the remotest degree, legalize or give validity to the contract. It but shows that the general assembly intended to adopt such measures as should compel obedience to the law; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, **3-263**.

19. PROHIBITED BY LAW. A contract to do a thing prohibited by statute is not, necessarily, void if the statute visit the unlawful act with a penalty. If the thing be *malum in se*, the contract can not be enforced, but as to things not immoral or against public policy it may be sufficient to enforce the statutory penalty only. If it was not the intention of the law maker to make the contract void, it will be enforced, and for the violation of law the penalty may be applied; *Union Gold Mining Co. v. Rocky Mountain Nat. Bk.*, **4-298**.

20. ILLEGAL TRANSFER. A sale and transfer of the powers of one company to another, without the authority of the legislature, are against public policy and courts will do nothing which would promote the transfer, as it is in utter disregard of the duties and obligations of the company; *Ottawa R.R. Co. v. Black et al.*, **6-359**.

21. STATE POLICY; HOW EVIDENCED. The policy of a state not to permit the transaction of business in its limits by foreign corporations, or to allow such corporations to acquire and hold real estate, must be expressed in some affirmative way. It can not be inferred from the fact that the legislature has made no provision for the formation of similar corporations; *Stevens v. Pratt et al.*, **9-85** and note.

22. —. Equity has no jurisdiction of an information by the attorney general, against a private trading corporation, whose proceedings are not shown to have injured, or endangered, any public or private rights and are objected to, solely, upon the ground that they are not authorized by its act of incorporation and are,

therefore, against public policy ; Attorney General *v.* Tudor Ice Co., **3-440**.

See RAILROAD COMPANY.

PURCHASER.

1. OF CORPORATE PROPERTY UNDER AUTHORIZED MORTGAGE. Where a railroad company, under authority of law, executes a mortgage or deed of trust upon all its property, both real and personal, including its franchise, and the same is duly recorded in the several counties through which the road runs, a purchaser of such property, under a valid foreclosure of the mortgage, will take the same free of all subsequent liens and incumbrances. The title of the purchaser, for the purpose of cutting off all intervening liens, will relate back to the date of the record of the mortgage ; Cooper et al. *v.* Corbin et al., **9-192**.

2. WHERE HE TAKES FREE FROM TAXES. Where, at the time the taxes assessed upon the capital stock of a railroad company become a lien on its property, a prior lien has been created upon the same by the execution and recording of a valid mortgage thereon the tax lien will attach only on the company's equity of redemption, and when that equity is cut off by a foreclosure and sale under the mortgage, the purchaser will take the property free from any lien for such taxes, and a court of equity will enjoin a sale of the rolling stock of such company for the payment of the taxes. *Id.*

Q.

QUO WARRANTO.

1. RELATORS. Any person having an interest in a corporation may prosecute proceedings by quo warranto, to test the validity of an election for directors ; the right is not confined to the defeated candidates ; State of Louisiana *v.* N. Orl., J. & G. N. Ry. Co., **1-578**.

2. —. Stockholders of a corporation who claim to have been legally elected directors thereof may file an information under section 750 of the code of Indiana, on their own relation, without the prosecuting attorney, against others by whose usurpation the relators are prevented from exercising such office ; Becket et al. *v.* Houston et al., **1-379**.

3. WHO MAY INSTITUTE. Under the Alabama code of 1876, it is competent for the circuit court to direct the solicitor of the circuit to proceed by information, in the nature of quo warranto, against a corporation guilty of non user or mis-user of its franchise. In the same way such proceeding may be instituted, in the name of the state, by any individual who shall file security for costs approved by the circuit clerk ; Tuscaloosa Scient. and Art Ass'n *v.* State, ex rel., **6-120**.

4. **CONTROL OF SUIT.** Although individuals may institute proceedings for the dissolution of a corporation, the proceeding will be in the name of the state, the informer's name being joined as relator; the proceedings are, however, conducted in the interest of the state and the relator can neither confess error, nor dismiss the suit without leave of the court before which it is pending. *Id.*

4½. **IMPEACHMENT OF EXISTENCE.** Whether an incorporated company was or was not properly organized, according to its charter, is a question that can not be made collaterally, but must be made by a direct proceeding against the corporation; *Gill's adm'r v. Kentucky etc. Mfg. Co.*, 3-346.

5. **DISSOLUTION.** It is well settled that a corporation can be judicially determined to have ceased to exist only in a suit to which the commonwealth is a party; *Briggs v. Cape Cod Ship Canal Co.*, 10-568.

5½. **WHEN PROPER REMEDY.** Quo¹ warranto is the appropriate remedy against persons usurping the offices of trustees of an incorporated church; *Commonwealth, ex rel. etc., v. Graham et al.*, 4-116.

6. **DE FACTO OFFICER.** Where an association, which has been organized as a corporation, under the statute of Kansas, sues a person who has acted as treasurer for the company for over a year, for moneys received by him as treasurer of such corporation, upon the ground that he has ceased to be such treasurer and that his successor has been duly elected and qualified, and has taken possession of the office, and it appears that such person — the original treasurer — is still in possession of the office, claiming that his successor has not been elected and qualified, the action can not be maintained. The proper remedy of the plaintiff to determine whether the defendant is still the treasurer of the association, or not, is a civil action in the nature of quo warranto; *Hunt v. Pleasant Hill Cemetery Ass'n*, 9-324.

7. **DISTURBANCE OF ENJOYMENT.** Where a majority of a church congregation pretending, contrary to the fact, that some of the trustees have resigned and refused to act, proceed to elect others in their places, without notice to the minority of the association, and the parties elected proceed so to act as to exclude the minority from the use and enjoyment of the church property, the remedy, as to the illegal election, is by quo warranto; *Nelson et al. v. Benson et al.*, 5-231.

8. **NATIONAL BANKS.** An information, in the nature of a quo warranto, to try the right to the office of director in a bank organized under the national currency act will lie only in a proper court of the United States, the sovereign power which created this class of corporations. The courts of the states have no jurisdiction in such cases; *State etc. v. Curtis*, 3-167.

9. **WHEN NOT LIE.** An information, in the nature of a quo warranto, will not lie to persons associated, on the ground that as

a corporation it does not intend, in good faith, to carry out the purposes of its organization ; *State, ex rel., v. Beck et al.*, 9-227.

10. WHEN NOT LIE. An information, in the nature of a writ of quo warranto, will not lie to an association of persons, or a corporation, on the ground that as a corporation it does not intend to construct the whole of the work proposed by and described in articles of association—in this case a railroad. Nor will such information lie on the ground that the real purpose of the organization is to condemn and appropriate private property over which to construct the proposed work ; *State, ex rel. Cafer. pros. att'y, v. Kingan et al.*, 7-53.

11. —. Under a statute which authorizes any person whose private right or interest has been injured or put in hazard by the exercise by any private corporation, or persons claiming to be such, of a franchise or privilege not conferred by law, an information in the nature of a quo warranto will not lie in favor of such individual against the stockholders of a corporation, if the forms of law in the organization of the corporation, as required by a general statute, have been complied with and the proper certificate of incorporation issued. This is so, although the certificate was obtained by fraud ; *Rice et al. v. Nat'l Bank of the Commonwealth et al.*, 7-483.

12. REFUSED WHEN. A contested election of directors of a corporation was decided by votes cast upon shares owned by two persons, who had pledged them to another as security for an indebtedness. The stock stood upon the books of the corporation (and always had done so) in the name of the pledgee, as trustee. Pledgee had always voted the stock without objection until the meeting at which the contested election was held, and he so voted it at that election, no objection being made until the votes were being counted or had been counted. It was held, on an application for a quo warranto against the directors elected at such meeting, that judgment must be for respondents and the application be refused ; *Hoppen et al. v. Buffum et al.*, 4-151.

13. INDUCTION INTO OFFICE. Persons who, at an election for directors of a corporation, have only a minority of the votes received by the inspectors, can not, upon an information in the nature of a quo warranto, be declared elected and inducted into office, although it is made to appear that legal votes sufficient to have made up a majority in their favor were tendered and improperly rejected by the judges of election ; *State, ex rel., v. M'Daniel et al.*, 4-20.

14. TIME AS A BAR. After a user of corporate franchises during fifteen years an information in the nature of quo warranto, against the persons acting as a corporation, will not be entertained, in Indiana. Such proceeding may, however, be limited in particular cases to a shorter period, where requiring a longer time would be unavailing, unreasonable or unconscionable on ac-

count of the laches of relator; State, ex rel. Sleeth et al., *v.* Gordon et al., 9-264.

15. **INSTANCE.** Where a turnpike company had used the franchises of a corporation during nearly nineteen years, acting under articles of association which were defective in failing to set forth the line of the route of the road, or to describe it etc., a prosecution by information, in the nature of quo warranto, against the persons in possession of such corporate franchises, to show by what right they are held, is barred by lapse of time. *Id.*

16. **RESIGNATION PENDING PROCEEDING.** Where defendants, charged with usurpation of office, pending quo warranto proceeding, resign, their resignation constitutes no answer. Their successors stand, as to the unexpired term, in their shoes, and will be bound by the judgment; State, ex rel. Att'y Gen., *v.* M'Daniel et al., 4-20.

17. **PLEADING.** The rules of pleading prescribed by the code of Ohio do not apply to proceedings in the nature of quo warranto. Pleading in such cases is governed by the rules in force at the time of the adoption of the code. Wherefore, in such proceedings, the defendant may, by leave of court, plead double, and where the charge against him is that he usurps an office, he may be allowed to set up several titles thereto. *Id.*

18. —. A proceeding in quo warranto, to dissolve a corporation, or declare a forfeiture of its charter, or to oust it from the exercise of franchises which are usurpations, must be against the corporation itself and not against the individual corporators; State, ex rel. Att'y Gen., *v.* Taylor et al., 4-599.

19. —. The common law system of pleading, and not that prescribed by the code of civil procedure, is to be followed in proceedings in quo warranto; therefore, new matter set up in confession and avoidance of a plea is taken as confessed if not denied. *Id.*

20. —. Where an information is exhibited contemplating the case of an assumption of the franchise of incorporation without legal right, to which respondents answer averring right and setting forth title, a demurrer to the plea admits the facts alleged well pleaded. It follows that under such admission respondents must be deemed to be lawfully incorporated unless there be insuperable difficulties in the way; Att'y Gen., ex rel. Nelson, *v.* M'Arthur et al., 6-606.

21. **INFORMATION; WHEN SUFFICIENT.** An information is sufficient if it appears therefrom that the defendants named pretend to be organized as a corporation and are exercising corporate powers, when they are not organized as the law requires; State, ex rel., *v.* Beck et al., 9-227.

22. **PARTY TO PROCEEDING.** An information against a corporation in its corporate name, charging it has not been legally organized, pointing out defects in its organization and praying for the

dissolution of its franchises is bad for not being against certain persons claiming to be a corporation, for it can not be brought in to court as a corporation to answer an allegation that it never was a corporation. When a corporation is brought into court by its corporate name its existence, as such, is admitted; *Mud Creek Draining Co. v. State, ex rel. Marley et al.*, 5-337.

23. PRACTICE. When an information in the nature of quo warranto is filed against a corporation, by its corporate name, it admits the corporate existence of respondent de facto, but not its legal right to exist or to exercise any other franchise specified in the information. When, therefore, a charter, regular upon its face, is pleaded by respondent, it is competent for relator to show, by replication, that such charter has become forfeited by the act of respondent, or, that it does not, in fact and in law, confer the particular franchise in dispute; *State of Ohio v. Pennsylvania & Ohio Canal Co.*, 4-54.

24. PROCEEDINGS IN NATURE OF. A proceeding under a code, of Iowa, which provides that "a civil action, by ordinary proceedings, may be brought in the name of the state," to test the right of certain persons claiming to be a corporation to act as such, must be brought against the individuals associating and acting, not against the alleged corporation; *State of Iowa v. Independent Sch. Dist.*, 6-522.

25. PARTIES. Where an information, in the nature of a quo warranto, is aimed at alleged corporate delinquencies it supposes and virtually admits corporate existence, instead of denying, or ignoring, it and the corporation itself is a party; *Att'y Gen., ex rel. Nelson, v. M'Arthur et al.*, 6-606.

26. MOTION TO QUASH. A motion to quash a writ of quo warranto must be for some defect in the suggestion itself, and not for any matter outside of it. Mere defects in form, that can be amended, will not be regarded; *Commonwealth, ex rel. etc., v. Graham et al.*, 4-116.

27. BURDEN OF PROOF. In proceedings by information in the nature of quo warranto, the people are not bound to show any thing. The burden, generally, lies on the defendant, who must prove his title as pleaded, or such part of it as is traversed by the replication; but the court does not express any opinion as to whether or not any exception to this general rule obtains in cases where the act, charged to work a forfeiture, implies a violation of a public law, or would impute to the respondent crime that might involve punishment, on the ground of the presumption in favor of the respondent's innocence; *Chicago City Ry. Co. v. People, ex rel. Story*, 5-310.

28. MEASURE OF PROOF. Where the lapse of time is great, in this case ten years, since the act was required to be done, as, in the case, to procure the consent of a given number of the owners of a certain proportion of property by lineal feet along a street

frontage, to the laying etc. of a street railway, and there has been a subsequent acquiescence and all written evidence of consent has been destroyed by fire, and oral consent might, under the ordinance requiring it, be given, slight evidence was held to be sufficient to establish the fact of such consent. *Id.*

29. EVIDENCE OF MIS-USER. In a proceeding to dissolve a corporation for mis-use of its franchise, the trial court can not affirm, as matter of law, that the managing officers of the corporation had knowledge that the agents of the company were violating proper rules of action framed in accordance with the company's charter; such matter is for the consideration of the jury; *Tuscaloosa Scientific and Art Ass'n v. State, ex rel.*, 6-120.

30. CREDIBILITY OF WITNESS. Upon the trial of an information, filed against a corporation, charging a mis-use of its franchise, it is competent for the defendant to give evidence tending to show the animus of the informing relator in instituting the prosecution. Thus, where it was charged there was a mis-user in establishing covertly, or by simulation, a lottery not authorized by charter, it was admissible for defendant to show the information had its origin in a combination, or conspiracy between proprietors of other associations, engaged in the lottery business; for, if the witnesses developed their interest in such associations, it was proper to be considered by the jury, in respect of the credibility of the witnesses. *Id.*

31. EVIDENCE. Upon the question whether, in equity and good conscience, the charter of a bridge corporation should be forfeited for neglect to make returns as required by law, evidence is admissible to show how the corporation has been managed, the amount of its receipts from tolls and its expenditures; as well as whether the bridge is longer needed to accommodate public travel; *State v. Barron et al.*, 8-391.

32. EFFECT OF JUDGMENT. A judgment of ouster, entered upon an information in the nature of a quo warranto, against a corporation, excludes the corporation from the right to exercise its franchises. A necessary effect of the judgment, whether followed by execution or not, is to exclude the corporation and no grantee or licensee of such corporation can thereafter justify his action under its rights or franchises; *Campbell et al. v. Talbot et al.*, 9-428.

33. INSTANCE. A grantee of a corporation with franchise, by charter, to hold mill seats on waters connected with its canal and to erect mills thereon, erected and maintained a certain dam. Subsequently, by judicial decree judgment of ouster passed. A grantee of the corporation, by deed executed prior to the entry of such judgment, holds possession adversely from that day, and acquires a prescriptive right at the expiration of twenty years. *Id.*

34. PENALTY. Where there is an usurpation of the franchise of being an incorporated society, which so acts as to injure a member, in his legal rights, but no bad faith is exercised toward

him, the purposes of justice will be fully answered by judgment of ouster from the illegal franchises and the imposition of a nominal fine, carrying costs; *People, ex rel. Stewart, v. Young Mens F. M. Total Absti. So.*, 6-626.

35. JURISDICTION. The court of common pleas in Georgia has concurrent jurisdiction with the circuit court of such a proceeding by information; *Becket et al. v. Houston et al.*, 1-379.

R.

RAILROAD COMPANY.

1. CHARACTER AND DUTY. A railroad corporation is a common carrier, occupying, also, a peculiar relation to the public, being vested with certain franchises, for the public benefit. Such franchises it is bound to use with fairness and for the common good; *Messenger et al. v. Pennsylvania R.R. Co.*, 5-542.

2. OBJECT OF THEIR CREATION. The considerations operating on the general assembly and the people, in granting charters to railroad corporations, were two-fold. The first and most important was, the accommodation of the public and the promotion of their interests. The other was, the advancement of the interests of private individuals, who should become stockholders in such corporations; *Peoria & R. I. Ry. Co. v. Coal Valley Mining Co.*, 5-225.

3. PUBLIC CHARACTER. A railroad company is a quasi public corporation, receiving powers denied to individuals, partnerships, and other corporations and common carriers. It is bound by reciprocal obligations to the state and owes reciprocal duties to the public; *Board of Comm'rs et al. v. Lafayette etc. R.R. Co. et al.*, 7-26.

4. RIGHTS AND DUTIES. By their charters, railroad corporations are empowered, besides building and maintaining their roads, to carry passengers and property for compensation. At the same time a correlative duty is imposed, that they shall receive and carry passengers and freights over their road, as they may be offered for the purpose. When they accept their charters it is with the implied understanding that they will fairly perform these duties to the public, as common carriers of both persons and property, under the responsibility which that relation imposes; *Peoria & R. I. Ry. Co. v. Coal Valley Mining Co.*, 5-225.

5. AVOIDANCE OF DUTY. Railroad companies can not escape from their duty, as common carriers of both persons and property, by neglect, refusal or by agreement, with other persons or corporations, that they will disregard or refuse to perform them. They have no power to absolve themselves from performing their charter obligations, and any effort to do so, by contract or otherwise, is void. *Id.*

6. **PUBLIC COMPANIES.** Railroads, constructed under a general railroad law, become, ipso facto, public; because the public have the right of passage thereon by paying reasonable and uniform tolls and that, regardless of the motives of their projectors or the generality of their probable use; *Nat. Docks Ry. Co. v. Central R.R. Co. et al.*, 8-420.

7. —. Railroad companies are quasi public corporations and agencies. Their directors act as agents for the company and as trustees for the public and are clothed with an important public trust. When the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public; *Pueblo & Ark. Valley R.R. Co. v. Taylor et al.*, 9-37.

8. **NATURE OF FRANCHISE.** Railway companies have delegated to them, as part of their franchises, much of the sovereign power of the state, in consideration of their discharging part of what are the proper duties of government, that is, providing the means of commerce and intercourse by constructing the roads; which are the avenues of that commerce. When, being authorized, they assume to operate these roads, they have devolved upon them, in consideration of that franchise, the additional duty, which is not one of the proper functions of the government, of common carriers, and are obliged to transport all merchandise and passengers, on the terms fixed in the grant through which they obtained their franchises; *Rogers Locomotive etc. Works v. Erie Ry. Co. et al.*, 3-599.

9. **IMPLIED CONDITION OF FRANCHISE GRANTED.** In the grant of the franchise, of building and using a public railway, there is an implied condition that it is held as a quasi public trust, for the benefit of the public, and the company possessed of the grant must exercise a perfect impartiality toward all who seek the benefit of the trust; *Messenger et al. v. Pennsylvania R.R. Co.*, 5-542.

10. **LIMITATIONS ON CHARTERS.** A common carrier exercises a public employment, and in accepting a charter, which gives a railroad company an artificial existence as a common carrier, the company, necessarily, accepts it with all the duties and liabilities attached, by the existing law, to the function of a common carrier. Among these duties is that, well settled at common law, he shall not exercise any unjust and injurious discrimination between individuals in the rates of toll; *Chic. & A. R.R. Co. v. People, ex rel. Koerner et al.*, 5-196.

11. **LEGISLATIVE CONTROL OF RAILROAD CHARTERS.** Conceding the inviolability of railroad charters, regarded in the light of contracts, the legislature has the clearest right to pass an act for the purpose of preventing an unjust discrimination in railway freights,

whether as between individuals or communities, and to enforce its observance by appropriate penalties. *Id.*

12. **CONNECTING COMPANIES.** A Maryland railroad corporation, whose charter contemplated the extension of its road beyond the limits of the state of Maryland, was licensed by an act of the legislature of Virginia, re-enacting the Maryland charter, in words, to continue its road through that state, and, subsequently, was allowed by an act of congress, to extend a lateral road into the district of Columbia, in connection with its road through Maryland and Virginia. It was held, the unity of the road being unchanged in name, locality, election and powers of officers and mode of declaring dividends and of conducting business generally; (a) that no new corporation was created, either in the district of Columbia or the state of Virginia, but only that the old association was exercising its franchises in them, with their permission; (b) that, as related to responsibility for damages, there was a unity of ownership, throughout the line, in the several states and district; (c) that in view of such unity of ownership, the corporation was amenable to the courts of the district for injuries done in Virginia on its road, and in all actions not local; (d) that such responsibility was not changed by reason of the issuing, to travellers, of "coupon" tickets, upon each of which was printed, by way of limitation, the words, "Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone"; (e) such indorsement on a ticket given to a passenger over connecting lines of transportation, does not exempt the company issuing the ticket from liability for a loss occurring on a connecting line, unless the passenger had actual notice of the limitation and assented to it; *R.R. Co. v. Harris*, 3-83.

13. —. Where a through line, for the transportation of passengers and freight, is established by the owners of different roads, the first carrier who receives fare over the whole route and gives a through check for baggage, becomes liable for any loss or injury, not only on its own line, but on any other road in the connecting line, throughout the entire distance; *Croft v. Balt. & O. R.R. Co.*, 5-191.

14. —. Where three companies constitute a 'through line and the fare received for through tickets is accounted for by the first to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability. *Id.*

15. **PURCHASE OF STOCK IN CONNECTING LINE.** Where a railroad corporation was organized under a general incorporation law of the state of Kansas (Gen. Stat., ch. 23) relating to private corporations, the corporation had the right to purchase and hold such real and personal estate as the purposes of the corporation required;

and, in the absence of any showing to the contrary, a purchase of stock in a connecting line will be presumed to be requisite for the purposes of the corporation; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

16. LEASING OTHER LINES. Any railroad organized under the laws of this state (Kansas), may lease another road, and the road so leased will become in operation thereof, a continuation and extension of the road so leasing it; *A. T. & S. F. R.R. Co. v. Fletcher*, 10-432.

17. —; IN OTHER STATES. Under the charter of the road in question, it could lease roads in other states if the roads so leased became, in their operation, a continuation of the leasing road. *Id.*

18. STOCK OF LEASED ROAD. By the provisions of its charter, this road could accept the stock of a road leased by it, and guarantee its first mortgage bonds. *Id.*

19. COMPETING ROADS. The grants, by the state of Georgia, of charters to several railroads from the seaboard to the interior of the state, indicate a public policy to secure a reasonable competition, between such roads, for public patronage, and it is contrary to that policy for one of said roads to attempt to secure a controlling interest in another, and a contract made with that view will be set aside by a court of equity as illegal, beyond the objects of the charter and contrary to the public policy of the state; *Central R.R. Co. et al. v. Collins et al.*, 3-224.

20. SUBSCRIPTION TO STOCK. It has been repeatedly held, in Michigan, that only the commissioners appointed for the purpose, can lawfully take subscriptions to the stock of a railroad company; *Northern Cent. Mich. R.R. Co. v. Eslow et al.*, 6-625.

21. SUBSCRIPTIONS TO STOCK. The statute, authorizing and regulating the incorporation of railroads in Michigan (Comp. L., 1871, § 2405) provided as to subscriptions of stock not made upon the original articles of association, that they should be made "in the manner to be provided by its (the company's) by-laws." Held, that a subscription made before any by-laws were adopted gave no rights to either party and, where there had been nothing done to create an estoppel, the subscriber was not bound by a by-law subsequently made, the intent of which was to adopt such subscription; *Carlisle v. Saginaw V. & St. L. R.R. Co.*, 4-476.

22. —. The court can not take judicial notice, that in the location of a line of railroad, the company authorized to construct it between two given points, will or will not so locate it so as to run to, near or through a given town, which is empowered to subscribe for the stock of the corporation; nor can it act upon any knowledge it may have of the geography of the state. The plaintiff must aver and prove facts, in this regard, if he seeks to take advantage of them, to avoid a subscription to stock on that ground; *Phillips et al. v. Town of Albany et al.*, 4-220.

23. CONTINGENT SUBSCRIPTION. If one town subscribes for

stock in a railroad corporation, contingent upon like action on the part of other towns, also authorized to subscribe, and the subscriptions of all or any of the other towns fail or lack validity, on any ground, then by the terms of the agreement to subscribe, the town making the conditional subscription will be absolved from all obligation to receive or pay for the stock. *Id.*

24. **STATUTE CONSTRUED.** The general railroad law of New Jersey authorizes the organization of a company to build a railway wholly within one city; *Nat. D. Ry. Co. v. Cent. R.R. Co.*, 8-420.

25. **CONSTRUCTION OF ROAD; CROSSING STREAMS.** To the crossing of streams, the company not being their owner, legislative authority is required. This necessity exists whether the streams to be crossed happen to be public highways or mere private water courses; *Chicago, R. I. & P. R.R. Co. v. Moffit*, 5-330.

26. **DUTY TO RESTORE STREAM.** Where authority is given, by charter, to cross any stream of water in the route or line of its road, coupled with the duty to restore the stream so crossed to its former state, or such state as not to materially impair its usefulness, it is incumbent on the railroad company constructing the bridge so to construct it that the water should not be obstructed, pent up, or otherwise caused, thereby, to overflow lands of riparian owners and to keep it in such condition as not to obstruct the stream to the injury of such owners. *Id.*

27. **PROHIBITION OF STATIONS.** A railroad company, chartered by a legislative act and intrusted with the right of eminent domain, upon the ground that its road is for the use of the public, received a conveyance of real estate upon condition or agreement that the company would not establish a depot or station within three miles of a designated point. It was held that the condition or agreement was illegal as against public policy, and that a reconveyance of the property could not be decreed on account of a violation thereof by the railroad company; *St. Louis, J. & Chi. R.R. Co. v. Mathers*, 5-277.

28. —. The directors of a railroad company are the trustees both of the stockholders of the company and the public, and in the discharge of their three-fold duty are required to act with reference to the public convenience, on the one hand, and the private interests of the stockholders, upon the other. The interests of both forbid there should be a positive prohibition against the establishing of stations at any point on the line of the road. Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done, without detriment to the interests of the stockholders, the law authorizes it to be established there, and no contract between directors and individuals can be allowed to prohibit it. *Id.*

29. **RELATION TO PUBLIC.** The public has a right to say that

railroad companies shall not be permitted to make any contract which would prevent them from accommodating the public — where entitled to it — in the matter of transportation and travel; *Pueblo & Ark. V. R.R. Co. v. Taylor et al.*, 9-37.

30. **ILLEGAL CONTRACT.** A contract for the payment of money — in this case a bond — which seeks to, and by its terms does, prevent a neighboring town through which a railroad passes, from having the facilities it is the duty of the owner of the road to furnish or which prevents such owner from the exercise of discretion in providing such facilities for the public is illegal and void. *Id.*

31. **RE-ORGANIZATION.** A railroad corporation re-organized under an act of the state of Ohio, of April 11, 1861, regulating the sale of railroads and the re-organization of companies (S. & C. 127). In its agreement it was stipulated that certain mortgage bonds of the original corporation should be assumed by the new association, and that the owner of such bonds should be entitled to vote at all meetings of stockholders, upon the performance of certain conditions, as to the extension of time in which the bonds shall become due. Such conditions being fulfilled by the holder of the bonds, he becomes entitled to vote and the company is liable to pay the bonds without further action of the new company; *State, ex rel. Att'y Gen., v. M'Daniel et al.*, 4-20.

32. **TRANSFER OF BONDS.** An executory agreement to sell and deliver such bonds to a corporation, made subject to ratification by its directors and stockholders, does not, until consummation by ratification, divest the holder of his title therein, nor of his privilege of voting by virtue of his ownership. *Id.*

33. **MAY MAKE REASONABLE REGULATIONS.** Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business, and they and their agents incur no liability in enforcing them in a proper manner; *Elmore v. Sands*, 4-603.

34. **REGULATIONS AFFECTING PASSENGERS.** It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers travelling on their lines of road. It is not only their right, but their duty to make such rules and regulations. But, such rules and regulations must always be reasonable and uniform with respect to persons. What are reasonable rules is a question of law and is for the court to determine, under all the circumstances in each particular case; *Chicago & Northwestern Ry. Co. v. Williams*, 4-263.

35. —. A rule which sets apart a car of a passenger train, for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one. *Id.*

36. —. Public carriers will not be justified, on the ground of mere prejudice, in the exclusion of a colored woman from the privileges of a car set apart for the exclusive use of ladies and

gentlemen accompanied by ladies ; at all events, until they furnish separate seats, equal in comfort and safety to those furnished for other travellers. They have no right to discriminate between passengers on account of color, race or nativity alone. *Id.*

37. **DISCRIMINATION AS TO PASSENGERS.** Railroad companies may discriminate between the amount of fare where the ticket is purchased and where the fare is paid upon the train ; Indianapolis, P. & Chi. Ry. Co. v. Rinard, 5-356.

38. —. Railroad companies have no right to discriminate between persons, and sell tickets to some and refuse others. *Id.*

39. **LIMITED TICKETS REASONABLE.** A railroad company is not bound to issue a ticket in advance of the day on which it has to be used, and has a right to insist and provide that it shall be used on the day upon which it is issued, and that every passenger, when he enters the train, shall pay his fare, or produce a ticket showing his right to ride upon that train. In enforcing such regulations, neither the company, nor its agent, incurs any liability ; Elmore v. Sands, 4-603.

40. **CONTRACTS NOT ENFORCEABLE.** A contract, of a railroad company, which gives to one, or more, persons, an exclusive advantage, or monopoly, over all other transporters in the transportation of goods, is unjust and can not be enforced at law ; Messenger et al. v. Pennsylvania R.R. Co., 5-542.

41. **LIABILITY FOR INJURY TO SERVANT.** The true rule is to hold the corporation liable for negligence, or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance ; Flike, adm., v. Boston & Alb. R.R. Co., 4-599.

42. —. As to such acts, the agent occupies the place of the corporation and the latter should be deemed present, and, consequently, liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal. *Id.*

43. —. So, of a railroad company, it is clearly its duty, in making up and dispatching a train, to supply it with suitable machinery and help for the business and journey it is about to undertake. If there be any want of care, in these respects, which causes an injury, it is liable to a servant ; as a fireman employed on another train. *Id.*

44. **DUTY AS TO MACHINERY.** It is the duty of a railroad company to provide suitable and safe machinery ; such machinery should not be so unskillfully constructed that the slightest indiscretion on the part of the operatives would prove fatal. Where

they are so constructed, it is such negligence as will render them liable for damages occasioned thereby to an employe who is ignorant of such unskillful construction : Tol., W. & W. Ry. Co. v. Fredericks, 5-266.

45. DUTY AS TO MACHINERY. The law does not require a railroad company to provide and use the best known appliances that mechanical skill and ingenuity have been able to devise and construct to prevent the escape of sparks from its locomotives, without reference to whether the company could, by any degree of effort, know of such inventions or not, or whether they have been tested and proved to be the best ; Tol., W. & W. Ry. Co. v. Corn et al., 5-263.

46. —. A railroad company is not bound to purchase the patent for every invention claimed to be an improvement on such machinery, and test it ; but, when such an invention has been tested and approved as better than that it is using, it is required to adopt and use the better machinery. In this, as in the discharge of their other duties, railroad companies can only be required to employ due diligence to provide themselves with the best, but can not be held to unreasonable and ruinous efforts to prevent injury. *Id.*

47. LIABILITY TO EMPLOYE. The fact that defendant's agent had employed a third brakeman to go upon a train, who, by reason of oversleeping, failed to get aboard in time, and injury was caused, did not excuse a railroad company from liability. Such hiring was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly dispatch its train, and this duty remained to be performed, though every man employed had died or run away during the night. If negligent in discharging this duty, either by act of commission or omission, whether employing improper help, or not enough of it, or in not requiring their presence upon a train, it is, upon every just principle, responsible for the consequences ; Flike, admr., v. Bost. & Alb. R.R. Co., 4-599.

48. —. Although negligence may be imputed to one employed, the only effect would be to make the negligence of the company contributory with that of the employe ; it would not affect the liability of the company. *Id.*

49. INJURY TO EMPLOYE. Although the charter of a railroad company may not, in terms, authorize the company to incur expense on account of injury received by their employes, yet they may, in exercising such franchises, incur such liability ; Tol., W. & W. Ry. Co. v. Rodrigues, 1-414.

50. THE CONSIDERATION FOR A PROMISE. When an employe has been disabled while in the employ of the railroad company, and in the discharge of his hazardous duties, it is a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure. *Id.*

51. **RAILROAD SUPERINTENDENT; POWERS.** The general superintendent may, in the exercise of his powers as such, bind the company for the payment of such liabilities, which his constructive consent assumed. *Id.*

52. —. Where an employe of a railroad company has received injury while in the discharge of his duty, and the station agent, in his capacity as such, assumes certain liabilities in his behalf, for nurse and medical attendance, and writes a letter to the general superintendent, stating the facts, it is presumed that the general superintendent received such notice, and, in the absence of any instructions to the contrary, consented, on the part of the railroad company, to assume the liabilities of the station agent for all reasonable charges. *Id.*

53. **THE RIGHT TO TAKE TOLLS.** The title of a railway company to demand compensation for carrying freight and passengers is not derived by it upon common law principles, and is not to be measured by the rules of the common law; the right to exact tolls or charge for freight is granted for a service to the public; it was an attribute of sovereignty, which has been granted; and where the grant does not fix the rates of toll which the company may levy, the only logical conclusion is that the company may fix them itself, subject to legislative superintendence; *Blake et al. v. Winona & St. Peter Ry. Co.*, 4-487.

54. **RIGHT TO REGULATE TOLLS.** A privilege of immunity of a public nature which can not be exercised without legislative grant is a franchise. The right to make roads and levy tolls is a franchise; a railroad is but an improved modern highway, which it is the duty and interest of the government to construct, when public interest and convenience demand it. The legislature may also, from time to time, regulate the use of the franchise and limit the amount of the toll which it shall be lawful to take; in the same manner as it may regulate the amount of toll to be taken at a ferry, or for grinding at a mill, unless it has deprived itself of that power by a legislative contract with the owners of the road. *Id.*

55. **POWER TO ESTABLISH TOLLS.** A railroad company is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier. When its charter authorizes it, in broad and general terms, to establish tolls, it imports nothing more than that the corporation should have the same right of establishing tolls that a natural person has when accepting as a common carrier; a right to be exercised within the same limitations that the common law, in behalf of justice and public policy, imposes upon the natural man; *Chi. & A. R.R. Co. v. People etc.*, 5-196.

56. **OF PURCHASE.** A grant of power to a railroad company to locate and construct branch roads does not confer authority to purchase and operate the railroad of another company constructed

under a different charter; *Campbell et al. v. Marietta & Cinc. R.R. Co.*, 4-60.

57. **TRANSFER BY PURCHASE.** When the railroad of one company is purchased by another railroad corporation, by authority of a legislative enactment, in the absence of any provision of law to the contrary, the purchased road passes to the purchasing company, subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor. *Id.*

58. **POWER AS TO LAND.** A railroad company vested with power to hold real estate donated for the purpose of aiding in the construction of its road or raising a fund to pay debts contracted in its construction, and for depots, roadbeds etc. and to sell and dispose of the same can not, nevertheless, become a large landed proprietor for purposes not connected with its creation. The amount of lands it may receive, however, can not be decided between private parties. That question can only be raised, by the state, in a direct proceeding against the railroad corporation; *Land v. Coffman et al.*, 4-510.

59. —. Under the general statutes, 202, § 4, of the state of Kansas, railroad corporations may receive lands by voluntary grant or purchase, and sell them "for the purpose of aiding them in the construction, maintenance and accommodation of their railways," and a contract to convey lands to a railway company for such purposes, conditioned the company should build its railway to a certain place and locate its depot within a certain town, was held not to be in contravention of public policy or void; *M'Clure v. Missouri River, Fort Scott & Gulf R.R. Co.*, 4-398.

See **COMMON CARRIER**; **EMINENT DOMAIN**; **FOREIGN CORPORATIONS**.

RAILROAD CONSTRUCTION.

1. **DEPOT.** An agreement was entered into by defendant company, in consideration of the transfer of roadbed etc., not to "build or allow but one other depot between" two points named. It is not a violation of this agreement to construct a station at a coal bank, where trains merely stop to take or leave cars, for the purposes connected with the coal trade. Such station is no more within the meaning of the contract than would be a water station; *Mahaska County R.R. Co. v. Des Moines Valley R.R. Co.*, 3-325.

RATIFICATION.

1. **OF ACTS OF AGENT.** Subsequent ratification is equivalent to prior authorization of the acts of an agent. No new consideration is necessary to support it; *Ferris v. Thaw et al.*, 8-265.

2. **INFERRED.** Ratification by a corporation of the unauthorized act of its agent is equivalent to previous authorization. It

need not be manifested by a vote or formal resolution or be authenticated by the seal of the corporation. It will be inferred from failure promptly to disavow the act when it comes to the knowledge of the corporation; *First Nat'l Bk. of Springfield v. Fricke*, 9-508.

3. **KNOWLEDGE.** Ratification implies knowledge, and a party can not be adjudged to have ratified an act of which he has no knowledge, actual or constructive; *First Nat'l Bank of Fort Scott v. Drake*, 9-340.

4. **BY ACQUIESCENCE.** An attorney was retained by the superintendent of a corporation. After retainer and while acting for the company, during a period of some eight months, the attorney, at different times, corresponded as such with the various officers and managers of the company, who recognized him as attorney. If there was any defect in the authority conferring the original appointment, this would amount to a ratification; *Southgate v. Atlantic & Pacific R.R. Co.*, 8-144.

5. **BY SILENCE.** Where an agency exists and the agent exceeds his authority, the silence of the principal may give rise to the presumption of an intentional ratification of the unauthorized act. Before such inference can be drawn from silence, however, there must have been afforded an opportunity to act or speak upon a full understanding of the circumstances, and these circumstances must be such as would properly and naturally call for some action or reply from men similarly situated; *Union Gold Mining Co. v. Rocky Mountain National Bank*, 4-298.

6. **CASE STATED.** The president of a corporation, without authority, signed the corporate name to a contract; the secretary was one of two agents with full power in the premises, and as such agent, had full knowledge; the other agent knew there was a contract and knew some of its provisions, with every facility for informing himself fully; he and the president were directors of the corporation; a supplemental agreement, which could not be understood without knowledge of the contract, was signed by the secretary of the corporation and was fully performed by the corporation; the contract was partially executed by the plaintiff, as to the time, and, so far as the motives and purposes of the defendants were concerned, was fully executed; and the execution of the contract was connected with important and radical changes in the business affairs of the corporation. There being no pretense that any officer, or other person connected with the company ever intimated any objection to the contract, held, there had been a ratification of the contract; *Perry v. Simpson Waterproof Manufacturing Co.*, 4-309.

7. **DISAVOWAL.** Where delay, on the part of the principal, to disavow the agency will result in loss, and where the transaction may turn out a profit or loss according to circumstances, the principal must disavow the unauthorized act of the agent within a

reasonable time after notice; *Union Gold Mining Co. v. Rocky Mountain National Bank*, **4**-298.

8. **REPUDIATION.** It is competent for a corporation, when sued upon a promise to pay, executed by an agent in its name, to show, as matter of defense, that immediately on its existence becoming known, or that power to execute negotiable paper had been exercised by its agent, its validity was formally and at once repudiated; *New York Iron Mine v. First Nat. Bk. of Negaunee*, **6**-612.

9. **DIRECTOR'S ACTS.** Ratification of the acts of an officer or agent of a corporation, must flow from the acquiescence of the directors, with knowledge of the facts, a consent by one of the directors, the other being ignorant of the acts done by the officer, will not operate as a ratification; *N. O. & B. R. Packet Co. v. Brown*, **10**-507.

10. —. When, at a meeting of a board of directors of a corporation for pecuniary profit, an act is ordered to be done without objection, either then or subsequently made, to the regularity of the meeting, by any director or stockholder, and the act thus authorized is subsequently performed, its legality can not afterward be questioned in equity on the ground of irregularity; *Samuel v. Holladay*, **1**-139.

11. —. As a general rule a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation; such contract does not necessarily require any independent and substantive act of ratification, but it may become established as a valid contract by acquiescence. The right to avoid it may be waived; *Kelley v. Newburyport etc. Horse Ry. Co.*, **10**-600.

12. —. A director of a corporation retained an attorney and authorized him to employ local counsel to attend to certain suits pending in which the company was interested. The report of the attorney originally retained of his retainer of the local counsel, to the director, was legal notice to the corporation and the continued silence of the director amounted, in law, to a ratification by him and, through him, by the corporation of the action of the original attorney in the premises; *Pittsb., Cin. & St. L. R.R. Co. v. Woolley*, **7**-170.

13. —. The board of directors of a corporation, may adopt, by resolution, an instrument (in this case a mortgage) which has been executed, originally, without authority, but which was executed in the name of the company, sealed with its corporate seal and signed by the proper officers. This will give the instrument full validity, as the deed of the corporation; *Wood v. Whelen*, **6**-442.

14. **BY OFFICERS OF CORPORATION.** Notes and mortgages given by the president of a corporation formed under the laws of the state of Iowa, executed by the president and secretary under the corporate seal, though made without authority from the

board of directors, are valid, if the directors afterward authorized and approved a sale of property in satisfaction of the same; *Reichwald v. Commercial Hotel Co.*, 10-203.

15. **BY OFFICERS OF CORPORATION.** Where the secretary of a corporation, without express authority, pledges the bonds of the company, secured by deed of trust, which is recorded, for an existing indebtedness and future advances, the directors of the corporation having knowledge of and acquiescing in such pledge, the act will be binding in the absence of proof of fraud. The principle that a subsequent ratification is equivalent to a prior authority will apply; *Darst v. Gale et al.*, 6-380.

16. **COMPETENCY OF.** Where a loan is made by request of an authorized officer of the corporation for the purpose of paying its debts, such loan being within the powers of the corporation to effect, the proper officer is competent to issue ordinary evidence of the new indebtedness and the directors or stockholders may sanction and ratify such transaction; and, it is immaterial that the new creditor is a director of the company at the time the loan is, in good faith, made; *Seeley v. San Jose Indep. Mill etc. Co.*, 9-17.

17. **NOT EFFECTUAL.** The president of a board of trustees having performed an act unauthorized by his corporation, a resolution of the board of trustees, adopted by the casting vote of such president, will not be effectual to ratify and adopt the unauthorized act, so as to create a liability on the part of the company; *Chamberlain v. Pac. Wool Growing Co.*, 6-255.

18. —. A bare vote of a corporation, accepting the report of a committee of its members, can not be construed to be such a ratification of the acts of a member in the voluntary payments of the debts of an association — in this case a religious society — as to authorize him to institute and maintain suit to recover the sum paid; *Blanchard v. First Assoc. etc.*, 4-419.

19. **CONTRACT, NOT TO BE RATIFIED.** A contract ultra vires the corporation is void. It can not be made valid by any subsequent act of the corporate body; for the reason that there is no residuary power to confirm it. That which it could neither make nor do it can not ratify. A void act can never become valid because it remains unquestioned; *Board etc. v. Lafayette etc. R.R. Co. et al.*, 7-26.

20. **UNCONSCIONABLE AGREEMENT.** An unconscionable arrangement will not be disturbed when there has been a ratification of it, with knowledge of all its bearings, after time has been had for consideration; *Kent v. Quicksilver Mining Co. et al.*, 8-614.

21. **LACHES OF STOCKHOLDERS.** The existence of a contract and the issue of mortgage bonds under it, being reported to a meeting of the stockholders in due time and no objection being made thereto and no offer of aid being tendered the embarrassed corporation executing the contract, but the parties to the contract

being allowed to proceed and expend their money in aid of the corporation, in good faith, it is too late, after the lapse of five years, for stockholders to impeach the transaction; *Kitchen et al. v. St. Louis, Kansas City & Northern Ry. Co.*, 8-199.

22. **BY ALL PARTIES.** A contract for the sale of the property and franchises of a corporation, by a meeting of a majority of the holders of bonds and stock, acting without authority, to make a contract binding on the corporation is valid when carried into effect, with the subsequent ratification of all the parties interested in the subject matter of the sale; *Chi., R. I. & P. R.R. Co. v. Howard*, 1-1.

23. **OF PROMOTERS' ACTS.** Where an act has been done, in the name of a corporation, which the corporation might lawfully perform, but which when done there was no authority to do, the board of directors, lawfully in office, may ratify it and such ratification will be equivalent to a precedent authority to do the act so confirmed; *Wood et al. v. Whelen*, 6-442.

24. **INSTANCE AS TO BONDS.** The promoters of a private corporation, acting as directors of a corporation *de facto*, which was not yet incorporated, resolved for the purpose of completing, and putting into successful operation, its works, and to provide for their future extension, to issue bonds, to be secured by mortgage of its company property, upon which to borrow money for the company's use. The company became incorporated and the promoters became its directors. The bonds and mortgage were executed, and, subsequently, while the bonds and mortgage were still in the possession of the company, the directors, by resolution, authorized their sale, upon terms stated, and the delivery of the mortgage security. This action of the directory of the company, now incorporated, was equivalent to an original authority to issue the bonds and an adoption of the mortgage executed under the prior resolve, as well as a ratification of the action of the promoters in respect thereof. Wherefore, irrespective of the question of power or want of power in the promoters of the corporation, to bind the future corporation, the securities became valid and binding obligations of the company by its act of adoption and ratification through its lawful board of directors. *Id.*

25. **MAY ASSUME DEBTS OF.** A corporation may, by express agreement, assume obligations entered into by its promoters prior to its organization, where the corporation receives the benefit of the contract in respect of which such obligations were incurred; *Reichwald v. Commercial Hotel Co.*, 10-203.

26. **PRIOR NOTE.** An officer of a corporation must have special authority to give the note of a corporation to take up outstanding prior obligations of the company. Where, therefore, persons as partners gave their notes, and before the same fell due, became incorporated, and after incorporation the president of the company renewed such notes as the notes of the corporation, and

made payments therein with corporate funds, the corporation was not liable on such notes, there being no evidence that it ever authorized them. Neither the fact that the proceeds of such notes were included in the assets of the new corporation, nor that some of the payments thereon were made in corporate checks will be sufficient to prove a ratification by the corporation; *M'Lellan v. Detr. File Works*, 10-644.

See AGENCY; CONTRACT; ESTOPPEL; POWERS.

REAL ESTATE.

1. ACQUISITION OF. It is a well settled rule that when a corporation is forbidden to take or receive lands, such prohibition goes to its capacity to acquire, and a deed made to it under such circumstances passes no title, and the conveyance will be absolutely void. The same rule applies when such corporation has once exhausted its capacity in acquiring land to the limit that is given; *St. Peter's Rom. Cath. Cong. v. Germain*, 9-185.

2. —. Where a corporation, by its charter, is without power to take title to real estate a conveyance to it is not void, but, only voidable and the sovereignty alone can object. It is valid until assailed in a direct proceeding instituted for that purpose; *Missouri Valley Land Co. v. Bushnell et al.*, 8-332.

3. —. The right of an association assuming to be a corporation, under a law authorizing the creation of corporations of the class to which it claims to belong, and which has exercised corporate powers to hold property, can only be questioned by a direct proceeding in behalf of the state; *Baker et al. v. Neff*, 7-106.

4. LIMITATION. By statute of Illinois, any corporation which may be formed for religious purposes may receive, by gift, devise or purchase, land not exceeding ten acres. The limitation was—in other words—contained in the revised statutes of 1845. It applies to such societies as were formed under a statute of 1869, although that act contains no words of limitation. Hence, when a religious society, organized under the act of 1869, has acquired ten acres of land all contracts and conveyances to it of any other real estate are void; *St. Peter's Rom. Cath. Cong. v. Germain*, 9-185.

5. PURCHASE. A corporation was authorized "to receive and hold, for the benefit of a high school, any lands, by gift, devise, donation, contract or purchase." A stockholder brought suit to enjoin a contemplated purchase of real estate, setting out that the corporation was unable to pay the contemplated price, and that the result of the purchase, if consummated, would be the bankruptcy of the corporation and the failure of the project to establish the school, but did not allege that the lands were not to be held for the benefit of the school. It was held that the petition did not show a cause of action; *Dudley v. Kentucky High School*, 5-382.

6. **DONATION.** A donation of lots of land by a town site corporation, in the absence of some special limitation on its powers, is not necessarily ultra vires; *Whetstone v. Ottawa University*, 7-116.

7. —. A corporation being formed for the purpose of locating and laying out a town site and making improvements therein, where the direct and proximate tendency of certain improvements sought to be obtained by a donation of land is the building up of the town and the advancement of the value of the remaining property of the corporation, such donation is within the powers of such corporation; and, this though the improvements are to be made outside the particular town site. *Id.*

8. **IMPLIED POWER.** Where, by the general law under which a corporation is organized, such corporation is authorized to contract and be contracted with, to purchase, hold, or sell property and to sue and be sued, it would seem the corporation has the power to execute a deed of trust, upon its real estate, to secure money, borrowed in furtherance of the objects of its creation, as a necessary incident to the power to acquire and hold the same; *West et al. v. Madison Co. Agric. Board*, 6-374.

9. **SALE.** Where the owners of real property sell and dispose of an undivided interest in such property for certain machinery, and they and the purchaser organize a corporation for the improvement and development of the joint property, the corporation has no interest in the question as to how the machinery is disposed of. It has no connection with the business of the company; *Marseilles Land & Water Power Co. v. Aldrich*, 6-406.

10. —. Where the owners of real property, upon which is a valuable water power, organize themselves as a corporation to improve and develop the power, by the construction of a dam, canal etc., and the construction of a cotton mill, putting such property in the corporation, the company will have authority, under the law, to sell and convey a portion of the real estate and invest the proceeds in other property. *Id.*

11. —. Admitted there is a want of authority on the part of a corporation, under its charter, to take or hold real estate except for certain specified purposes, in an action upon a contract of sale of real estate, under which the defendant has acquired and enjoyed property rights, such defendant can not defend by setting up the want of authority; *Mo. Valley Land Co. v. Bushnell*, 8-332.

12. **ACKNOWLEDGMENT OF DEED.** An acknowledgment of a deed, by a trustee, who is empowered by his corporation to act with others, before himself, renders the deed void as to him; but, such acknowledgment will not adversely affect the instrument as to the other trustees who act; *Darst v. Gale et al.*, 6-380.

13. **CONTRACT NOT WITNESSED NOR ACKNOWLEDGED.** As between the parties to it and those having knowledge of its existence, a

written contract for the sale of real estate is valid although not witnessed or acknowledged, as required in the case of a deed by the recording act, *Mo. Valley Land Co. v. Bushnell*, 8-332.

14. **CONTRACT OF SALE ; WHAT IT CONVEYS.** Where a person purchased an undivided one-fifth interest in realty, water power and personalty, under a written contract, with the owners of the other undivided interests, to form, at once, a special partnership to improve the same, which partnership should be treated as a corporation from that date, owning all the property of the several owners, and, until a regular organization could be effected, under a charter to be procured, the business was to be managed by a board of directors consisting of five members, to be controlled by a majority vote of the directors in the same manner as if a real corporation were organized, and each owner was to unite with the others in organizing a regular corporation under the charter when procured, each taking stock in proportion to his interest in the assets of the special partnership, and such corporation, when formed, was to become the owner of the assets of the special partnership and assume all its liabilities, the purchaser did not acquire, either legally or equitably, any title to the undivided one-fifth part of the property, but only an equitable right to stock in the company formed, the legal title thereto to be consummated when the corporation should be organized and the stock issued, and that neither he, nor a purchaser from him, could enforce a partition ; *Marseilles Land & Water Power Co. v. Aldrich*, 6-406.

15. **GRANT OF.** Where one grants to another, the right to enter upon his lands to construct a dam near a point specified, and to take possession of such portion of the lands as may be necessary for that purpose, when the dam is located and built, the grant becomes as specific in respect to the land subject to the easement as if it had been particularly described in the grant, and neither grantor nor grantee can, without the consent of other parties in interest, change the location of the dam ; *St. John's Orphan Home v. Buffalo Hydraulic Asso'n et al.*, 5-579.

16. **EASEMENT SUBJECT TO.** The estate and interest of a corporation in real property, although it may be but an easement, is subject to levy and sale on execution, as property distinguished from the franchise of such corporation. *Id.*

See **CHURCH ORGANIZATION ; CORPORATE DEED ; POWERS ; RELIGIOUS SOCIETY ; TAXATION.**

REBELLION.

1. **CORPORATION CREATED DURING.** Corporations created by the legislature of a state in armed rebellion against the United States are empowered, since the restoration of the normal condition of that state as to the nation and the states composing it, to sue and be sued in the federal courts ; provided, however, their acts of incorporation had no relation to any thing other than the domes-

tic concerns of the state and were neither in purpose nor operation hostile to the United States or in conflict with its constitution; but were, in fact, created in the ordinary course of legislation, such as there might have been had there been no war, or attempted rebellion and such as is of annual occurrence in all the states; *United States v. Ins. Cos.*, 5-98.

2. VOID NOTE. A promissory note executed by an iron company for money, or other thing, loaned to it, to be used by the corporation in erecting iron works and making iron for the late confederate government, for military purposes in carrying on the late rebellion against the United States, if known to the lender at the time of the loan, is against public policy and illegal. No action can be maintained on it; *Oxford Iron Co. v. Spradley*, 4-272.

RECEIVER.

1. NATURE OF PROCEEDING. A proceeding for the appointment of a receiver of a corporation, under the provisions of the revised statutes of New York (2 Rev. Stat., 463, § 63), is a proceeding against the corporation, and, if the appointment of a receiver therein is binding on the corporation, no one else can question it; *Whittlesey, receiver etc., v. Frantz, administratrix etc.*, 8-550.

2. JURISDICTION. The jurisdiction of the court to entertain a proceeding for the appointment of a receiver does not depend upon the truth of the facts alleged in the petition; if it allege sufficient facts and the court is called on to decide whether they are established, its determination, whether rightful or not, does not affect the jurisdiction. *Id.*

2½. SEQUESTRATION; PLEADING. When a bill is filed in the circuit court of the United States for one state, against a corporation created by the laws of another state, by a judgment creditor, praying a sequestration of its property, rights and franchises, and for the appointment of a receiver thereof, with power to collect from its stockholders the amount of the unpaid subscriptions, or sufficient thereof to satisfy such judgment, and for payment of his judgment, it is sufficient to allege the amount and value of such unpaid subscriptions, and to show that such subscriptions are more than sufficient to satisfy such judgment. That such corporation has no property, in the district in which the bill is filed, and no property any where except such unpaid subscriptions, is no objection to the jurisdiction of the court of defense to the suit; *Winans v. M'Kean R.R. & Navig. Co.*, 1-103.

3. WHEN TO BE APPOINTED. While a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so when such a course is indispensable to secure the rights of the legitimate stockholders and to prevent a failure of justice; *Stevenson et al. v. Davison*, 4-203.

4. —. Courts of equity are very reluctant to appoint re-

ceivers over any and all corporations; and, will never exercise jurisdiction in this regard, save with extreme caution and on a clear case of right and pressing necessity; *Kelly et al. v. Trustees etc.*, 6-130.

5. SUPERVISION OF EQUITY. A court of chancery can not assume, or vest in a receiver, the management and control of corporate business, except under proceedings instituted to wind up the corporation; *People, ex rel., v. Judge of St. Clair Circuit*, 5-478.

6. —. In case of proceeding taken to wind up an insolvent corporation, a receiver should not be appointed when it appears that the directors are closing its affairs, and that such directors are, in all respects, trustworthy; *City Pottery Co. v. Yates, superintendent*, 9-579.

7. —. As a general principle, courts have no jurisdiction to appoint receivers for corporations, in the absence of express statutory authority. The supreme court of Louisiana has recognized no exception to this rule, unless where the corporate property is abandoned or when there are no persons authorized to take charge of and conduct its affairs. Such power has never been claimed in the case of an existing corporation, the charter of which has neither expired nor been declared forfeited and which is under the management of competent officers; *Baker et al. v. Louisiana Portable R.R. Co.*, 9-366.

8. WHEN PROPERLY APPOINTED. On a bill by a portion of the stockholders, a director and creditor of a private corporation, against the corporation and the other stockholders, alleging mismanagement of the business of the company, its insolvency, its ceasing to prosecute the work for which it was organized, and that it would be useless to resume business, on account of financial embarrassment, and praying for a dissolution of the corporation and the appointment of a receiver, in which the defendant stockholders were properly served by actual or constructive notice of the suit, though the service of summons as to the corporation itself was void, it was held, that a clear case was shown for the appointment of a receiver, and the part of the decree making such appointment was affirmed, while that part dissolving the corporation was reversed for want of proper service on the corporation; *St. Louis & Sandoval Coal & Mining Co. v. Edwards et al.*, 9-169.

9. APPOINTMENT; IN CASE OF RAILROAD COMPANY. If a railway corporation becomes insolvent; makes default in the payment of the principal, or interest, of its bonds secured by mortgage; and the mortgaged property is an inadequate security, a receiver will be appointed on a bill for foreclosure. Especially will the appointment be made if in addition to the insolvency of the corporation and the inadequacy of the security, the only fund, for the payment of the debt, be the earnings of the company and these are being misapplied; *Kelly et al. v. Trustees etc.*, 6-130.

10. **EFFECT OF APPOINTMENT.** The subjection of corporate property and franchises to the custody of a receiver, is a suspension, in a greater or less degree, of the powers of the corporation. *Id.*

11. —. A receiver having been appointed of all the mortgaged property of a corporation, the land and other property of the company was in legal custody and could not be levied on; *Robinson v. Atl. & Gt. W. Ry. Co.*, 4-118.

12. —. A decree, made upon application of the attorney general, dissolving a corporation and appointing a receiver, vests in the latter all the property of the corporation; *Attorney General v. Guardian Mut. L. Ins. Co.*, 8-609.

13. —. On the appointment of a receiver of a manufacturing company the corporation is so far dissolved that, thereafter, the duty is no longer upon the trustees to make the annual report; *Huguenot Nat. Bank etc. v. Cudwell et al.*, 8-554.

14. **INJUNCTION.** The court, having acquired jurisdiction of proceedings for winding up the affairs of a corporation and having appointed a receiver, has jurisdiction to stay the suit of a creditor brought to recover assets to which the receiver is entitled, in whatever court such suit may be pending; *Attorney General v. Guardian Mut. L. Ins. Co.*, 8-609.

15. —. Such stay of proceedings may be granted on motion in the proceedings; it is not necessary that the receiver bring an action for that purpose. *Id.*

16. **INSTANCE.** Upon application to the supreme court of New York, by the attorney general, under the general insurance law of that state (Laws, 1853, ch. 463, § 17; Laws, 1869, ch. 902), against the Guardian Mutual Life Insurance Company, said corporation was dissolved and a receiver appointed. The decree was granted upon return of an order to show cause, service whereof was admitted by the attorney of the corporation, who appeared upon the hearing. At the time of the appointment an action was pending in the New York common pleas, brought by policy holders against said corporation and others, to recover its assets alleged to have been illegally diverted. After the appointment of the receiver he was, upon motion, made a party defendant in said action. He, also, brought an action to recover the same assets alleged to have been illegally transferred and, upon his motion, an order was granted perpetually staying proceedings in said action in the court of common pleas. On review, it was held that the supreme court acquired jurisdiction of the proceedings by the presentation of the petition of the attorney general and of the corporation on the appearance by its attorney and, therefore, had jurisdiction to grant decree appointing a receiver; that the right of action to recover said assets vested in the receiver upon his appointment; that the supreme court had power, in its discretion, to grant the order staying proceedings of the policy

holders; and, that the court of appeals could not interfere with the exercise of that discretion. *Id.*

17. **POWERS.** Where a receiver is appointed of the effects of a corporation, he succeeds to all its rights in all its property, claims and demands, to sell and dispose of these and reduce them to money, to be paid, under order of the court, to the creditors of the company, according to their rights. He does not become a trustee for creditors to manage, settle and enforce their claims against the individual stockholders, in enforcement of their several liability under statute; *Wincock et al. v. Turpin*, 6-473.

18. —. A receiver appointed for a corporation represents the corporation, the creditors and the stockholders and, in his character as trustee for the latter, he may dis-affirm and maintain an action, as receiver, to set aside illegal or fraudulent transfers of the property of the corporation made by its officers or agents, or to recover its funds or securities invested or mis-applied; *Att'y Gen. v. Guardian Mut. L. Ins. Co.*, 8-609.

19. —. Receivers succeed to all the rights of the corporation, and may assert all corporate rights against unfaithful officers as well they may, also, for the protection of creditors, attack and impeach the transactions of the corporation itself; *Raymond v. Palmer*, 10-482.

20. —. But they may not exercise actions which belong to creditors singly and not ut universi. *Id.*

20½. —. An action may be maintained by the receiver of a national bank, against its directors, to recover damages sustained by reason of the gross negligence and inattention of such directors to the duties of their trust. In the event such receiver is one of the directors chargeable with neglect of duty the action may be maintained by the stockholders and when the stockholders are numerous the action may be instituted and conducted by one, or more, in behalf of all; *Brinckerhoff v. Bostwick*, rec'r, 9-610.

21. —. The latest exposition of the law of the state of New York maintains the right of a receiver of a corporation, appointed under a judgment creditor's bill to recover the balance unpaid upon subscriptions to the capital stock of such corporations, without any previous call for the payment of such subscriptions having been made by such corporation; *Winans v. M'Kean R.R. & Nav. Co.*, 1-104.

22. **IN FEDERAL COURT.** The last exposition by the state courts will be followed by the federal courts in that state. *Id.*

23. **REMOVAL OF ASSETS TO ANOTHER STATE.** While a receiver of a private corporation, will not be permitted, as against the claims of creditors, to remove from this state the assets of the debtor, yet, when resident creditors have no legal claim to the property, he may be allowed, as a matter of comity, to remove the same; *Patterson v. Lynde*, 10-239.

24. **RIGHT TO SUE.** Where a receiver has been duly appointed by a court having jurisdiction of a corporation and the subject matter of the controversy, and is empowered to collect and institute all proceedings, at law or in equity, as may be necessary for enforcing the corporate rights, he will be authorized, independently of statute, to sue for the enforcement of such rights in his own name; *Frank v. Morrison et al.*, rec'rs, 9-390.

25. —. A statute made it the duty of a public officer (named), when an insurance company should appear to him to be insolvent, or in such condition as to render its further proceedings hazardous to the public, to file a bill, setting forth the company's condition and praying for injunction to restrain its doing business. The statute charged the court to appoint agents to take and control the company's effects and, by final decree, in a proper case, to dissolve the corporation and wind up its affairs. Under such authority the court may appoint receivers, and, in making needful orders in winding up the affairs of such company, the court may direct the receiver to prosecute, in his own name, for the recovery of assets, inclusive of unpaid subscriptions for stock; *Gill v. Balis*, 8-257.

26. —. An action to recover an unpaid subscription commenced by a corporation may be carried on by a receiver, in behalf of creditors, should the company become insolvent pendente lite; *Phoenix Warehouse Co. v. Badger*, 5-588.

27. —. The individual liability of the stockholder created by statute is to be enforced at law, unless the statute provides a remedy in equity. This is in no wise changed by reason that the affairs of the corporation have passed into the hands of a receiver; *Wincock et al. v. Turpin*, 6-473.

28. — **RECEIVER AGAINST MAKER OF STOCK NOTES.** Where suit is brought for the use of a receiver of an insolvent corporation, against a stockholder, to enforce payment of his subscription, or a note given therefor, no recovery can be had without an averment of the amount of the debts of the corporation. The receiver can recover no more than is sufficient to discharge the debts and liabilities of the corporation. The declaration should also show that the capital stock paid in has been exhausted; *Lamar Ins. Co. v. Moore*, 6-390.

29. —. In an action, by receivers of a corporation against a subscriber, to recover his subscription to the stock of the company, a book of by-laws, produced by himself, upon request of plaintiffs, and testified to be the by-laws under which the corporation acted, is admissible. As against a member of the company such by-laws are always admissible; *Frank v. Morrison et al.*, rec'rs, 9-390.

30. —. A decree, in a cause in equity, appointing receivers to wind up the affairs of a corporation and directing them, as such receivers, among other things, to make all collections of outstand-

ing indebtedness to the corporation and to institute all such proceedings, at law and in equity, as might be necessary for the purpose of enforcing the corporate rights, is admissible in evidence, in a suit to recover from a subscriber to the stock of the company the amount due upon his stock, to prove the due appointment of plaintiffs as receivers and their authority to institute and conduct the suit. *Id.*

31. **SUIT IN ANOTHER STATE.** A receiver of an insolvent corporation may bring a suit in the name of the corporation, to recover an indebtedness due such corporation, in a state other than that in which he was appointed; the suit not being brought in his official capacity; *Lycoming Fire Ins. Co. v. Langley*, 10-542.

32. **CAN NOT SUE, WHEN.** A receiver can not sue in a foreign jurisdiction for the property of the debtor; *Farmers & Merchants Ins. Co., to use of etc., v. Needles*, 8-92.

33. **SUCCESSORSHIP TO ACTION.** An action brought by a corporation, to recover an unpaid balance of a subscription to stock, may be continued by a receiver, subsequently appointed, in the name of the original party; *Phoenix Warehousing Co. v. Badger*, 8-476.

34. **PROCESS IN GARNISHMENT.** In the absence of some specific statutory direction, where the property and business of a corporation is in the hands and under the control of a receiver, such receiver is the proper person upon whom process should be served to bring the corporation in to court as garnishee; *Phelan, impleaded etc., v. Ganabin*, 6-286.

35. —. It is immaterial that the receiver, in such case, is non resident of the state and appointed by a court of another state. It is sufficient that the receiver is conducting business of the corporation within the jurisdiction of the court issuing the process of garnishment and where the sum due the judgment debtor is payable. *Id.*

36. —. A receiver of a corporation is amenable to process of garnishment in the absence of statute to the contrary and when the process does not tend to disturb his rights of possession under the general orders of the appointing court. *Id.*

37. —. It is not incumbent on a court to obtain leave, to proceed against a receiver, as garnishee, from an appointing court without the jurisdiction of the state. *Id.*

38. **JURISDICTION OVER.** Whether particular land or property should pass in to the hands of a receiver or be discharged therefrom could be determined only by the court which appointed such receiver; *Robinson v. Atl. & G. W. Ry. Co.*, 4-118.

39. **UNAUTHORIZED APPOINTMENT.** A corporation being solvent, when it is made to appear that the parties in charge of its property and affairs, have been elected as such by the stockholders of the corporation, and their election, has not been set aside, and no charge of apprehended fraud is made against such parties, no court

is authorized to displace them and appoint a receiver in their stead ; *Follett et al. v. Field, president etc. et al.*, 7-206.

40. UNAUTHORIZED APPOINTMENT. The appointment of a receiver for a corporation and grant of an injunction *ex parte*, whereby control of the corporate business is taken from the directors, are void acts ; *People, ex rel., v. Judge etc.*, 5-478.

41. QUESTIONING APPOINTMENT OF. The regularity of the appointment of a receiver of the assets of a corporation—in this case a life insurance company—upon petition of the attorney general, can not be questioned by any other tribunal than the one by which he was appointed ; *Att'y Gen. v. Guardian L. Ins. Co.*, 8-609.

42. PLEADING FRAUD IN JUDGMENT. In a complaint in an action it was not expressly averred that the judgment was fraudulent in fact, or that the officers of the corporation colluded with the plaintiff therein ; but facts were averred which, if proved, authorized the inference that the judgment was without consideration and fraudulently and collusively obtained. This was held to be sufficient after judgment. If the complaint was technically defective the objection should have been taken, by demurrer or otherwise, before issue on the facts, and, it was not necessary to employ the word "fraud" or "fraudulent" to characterize the transaction ; *Whittlesey, rec'r etc., v. Delaney*, 8-528.

43. INSTANCE. Defendant sold to the Excelsior Hay Carrier Company a patent right for the sum of \$25,000 ; \$10,800 was paid down and 500 shares of the stock of the corporation transferred. The corporation gave back a power of attorney authorizing defendant to sell rights and machinery, and it was agreed that it should receive all the net proceeds of sales made by defendant until it was reimbursed, from such sales and the sales of the stock, the money paid down and that, thereafter, defendant should be entitled to one-half the proceeds of sales coming to his hands, until the residue of \$25,000 was paid and all the balance should be paid to the corporation. In an action brought by a receiver of the corporation, obtained by defendant, for a balance of the purchase price, it appeared that the summons and complaint in defendant's action were served upon an officer of the company, who brought it to the notice of the board of trustees and, with the assent of the board, they were delivered to the attorney who brought the action, to protect the interests of the corporation ; no answer was interposed and the judgment was by default. As to the contract, while it was in form a sale for \$25,000, the payment of all save the sum paid down was dependent upon its being realized from sales, in the manner stated ; no absolute obligation on the part of the corporation to pay the balance was intended and no promise to pay the balance upon request could be implied ; wherefore, the evidence justified a finding that the judgment was without consideration and was suffered to be entered by fraud

and collusion between defendant and the officers and trustees of the corporation. *Id.*

44. **SALE BY RECEIVER.** A statute provided that where the property of an insolvent corporation, in the hands of a receiver, is incumbered by mortgages, or other liens, the legality of which is brought in to question, the court of chancery may order the receiver to sell the same clear of incumbrances etc. It was not intended by the words, "the legality of which is brought into question," to confine the remedy to mischief arising from litigation of any particular character, but to all litigation, between incumbrancers, respecting the validity, extent, or priority of their liens; *Randolph et al., trustees, v. Larned, receiver etc., et al.*, 8-408.

45. **VACATING JUDGMENT.** An action to set aside and vacate a judgment against a corporation, on the ground that it was obtained without consideration, by collusion with the officers of the corporation, and in fraud of creditors, may properly be brought in the name of and by a receiver of the corporation. *Whittlesey, rec'r, v. Delaney*, 8-528.

46. **ESTOPPEL.** A borrower making payments to a receiver, appointed for his creditor in proceedings to which he was not a party, can not, afterward, in proceedings against himself for the enforcement of his debt, question the validity of the appointment; *Burton, rec'r, v. Schildback et al.*, 7-566.

See EQUITY; LIQUIDATION.

RECORDING LAW.

1. **NOTICE OF RECORDED DEED.** The record of a deed, of real estate, to a corporation, reciting that the consideration thereof is a certain number of shares of its capital stock, is not constructive notice, to creditors, that the stock subscriptions have been paid by the conveyance of that amount of land; *Moss v. King*, 6-514.

RE-INCORPORATION; see RE-ORGANIZATION.

RELIGIOUS SOCIETY.

1. **PRESUMPTION.** A religious society is presumed to have been legally incorporated, if for ten years it has exercised the privileges of a corporation. A new incorporation, unless practically acquiesced in by the members, can not displace the old one; *Trustees of First Evang. Luth. Ch. v. Rechlin et al.*, 9-485.

2. —. Under the statute in Michigan a religious society, that in good faith has for ten years exercised corporate powers, bought and sold property etc., will be treated as a legal incorporation, though the proceedings to incorporate are in themselves fatally defective; *Trustees v. Webber*, 10-636.

3. **EXERCISE OF POWERS.** A religious society, being a corporation aggregate, and having a board of trustees to manage its affairs, can contract only through the aggregate body, by vote,

the trustees or select body by vote, or through an agent authorized by vote of one body, or the other, or both; *Meth. Epis. Ch. of Sun Prairie v. Sherman*, 5-651.

4. **SUBSCRIPTION.** A minister, having no special authority from the corporation or its trustees, solicited subscription to aid the society in paying the debt of its church and defendant promised to subscribe. Upon demand he refused to pay. Held, that he could retract his promise at any time before it had been accepted by a vote of the corporation or its trustees; the minister had no authority for the corporation to accept a subscription. *Id.*

5. —. A promise by the owner of land, that if a building should be erected thereon for public worship, he would, as soon as the legal organization of the church could be effected, convey such church and the lot of land on which it was built, and church was so erected with money raised by the subscription, and the religious body organized and incorporated, is supported by a sufficient consideration; *Whitsitt v. Trustees etc.*, 10-223.

6. **SUBSCRIPTION BEFORE ORGANIZATION.** A subscription made to a religious corporation, prior to the proper organization of such corporation, inures to the benefit of the company thereafter created, and payment may be enforced; *Willard v. Trustees etc.*, 4-370.

7. **CORPORATION DE FACTO.** There being an association of persons, who elect officers and proceed with the duties of the organization, as the building of a church, this constitutes a corporation de facto, and proves user; and the attempt to incorporate having been, at first, abortive, a subsequent formal certificate, referring to the original organization, relates back to such organization, and cures its defects. *Id.*

8. **RIGHTS OF MEMBER.** A member of a corporation, not being its financial officer, can not, without authority, make himself a creditor of the association by the voluntary payment of its debts; *Blanchard v. First Ass'n of Spiritualists*, 4-419.

9. **RATIFICATION.** A bare vote of a corporation, accepting the report of a committee of its members, can not be construed to be such a ratification of the acts of a member in the voluntary payment of the debts of the association as to authorize him to bring and maintain suit to recover the sum paid. *Id.*

10. **RIGHT OF VOTING; SHOULD NOT BE CONFINED TO MEMBERS.** Upon questions affecting the property of a religious corporation, the right to vote thereon should not be confined to persons only who are members of the church. Those who have contributed to its support, although not members, should be allowed a voice in such matters; *Niccolls et al. v. Rugg et al.*, 1-409.

11. **APPOINTMENT OF TRUSTEES — ELIGIBILITY.** An objection that one was not a legal trustee of a church, because he did not reside in the parish, not sustained. He was an officer de facto, and besides, it must be assumed that when the electing body

choose a trustee, they determine that he is in fact eligible; *Cicotte v. Anciaux*, 10-629.

12. CUSTOMS AND USAGES. When the statute defines the powers of trustees in a religious body, customs and usages of the church in conflict therewith will not be upheld; *M'Crary v. M'Farland*, 10-310.

13. RELATION TO SUPERIOR BODIES. A parish of the Protestant Episcopal Church, by its admission into union with the diocese of a state, and its connection through that with the Protestant Episcopal Church of the United States, acknowledges the authority of the constitution and canons of that church, and becomes amenable thereto; *Bird v. St. Mark's Church*, 10-363.

14. —; REMOVAL OF RECTOR. According to the canons of that church, a rector, canonically elected, and in charge, may not be removed by his parish against his will; nor can this be done, indirectly, by reduction of his salary as contracted for at his election. *Id.*

15. —; SALARY OF RECTOR. Until the pastoral relation is dissolved in some manner provided by the canons of the church, the rector may recover his salary, as provided for in the original contract. *Id.*

16. INTERFERENCE OF CIVIL COURTS. The civil court will not revise decisions of religious organizations in ecclesiastical matters. *Id.*

17. AUTHORITY OF TRUSTEES. The trustees of an incorporated church, as the representatives of all the members of the church, may, in the corporate name, enforce agreements made for the use and benefit of the society before its legal organization, and on a bill for specific performance, it is immaterial with whom the agreement was made, and it is not necessary to state the name of such persons, as the agreement is enforceable in the corporate name; *Whitsitt v. Trustees*, 10-223.

18. JURISDICTION. The civil courts will not interfere with the jurisdiction of ecclesiastical courts in matters of conscience, faith or discipline; but the civil courts have a superior jurisdiction in all matters involving liberty of property, or the enforcement of the contract entered into between religious organizations and their members; *Gartin et al. v. Penick et al.*, 1-493.

19. CONTRACT OF ORGANIZATION. The organic law of a church is a compact entered into between all its members. *Id.*

20. PRESBYTERIAN CHURCH. In the Presbyterian church the purpose of this contract is the guidance and protection of each constituent church and member, and is inviolable by any power of the aggregate church. *Id.*

21. TRIAL BY. A religious corporation, organized under the statute of New York, 1813, vested with the property and control of the affairs of the corporation, has no power to try a corporator for any moral delinquency or to disfranchise him in

consequence thereof ; *People, ex rel., v. German United Evang'l Church of Buffalo*, 4-594.

22. POWER OF EXPULSION. A church is a voluntary association, not recognized by law, having power to adopt its own rules for admission and discipline and to administer them in its own way, independent of any control by the courts, while free from any intention to injure its members or those not belonging to it. *Mandamus* will not lie to re-instate one expelled. *Id.*

23. JURISDICTION OF ECCLESIASTICAL COURT ; COMMISSION. A mis-recital in a commission issued by a bishop of the Protestant Episcopal church, appointing persons as presenters to investigate alleged offenses and misconduct of a presbyter and presentment make, does not impair the jurisdiction of the ecclesiastical court constituted to try charges and specifications set out in the presentment ; *Chase et al. v. Cheney*, 1-471.

24. —. When an ecclesiastical court has jurisdiction of the subject matter and the person, it has power to proceed with the trial upon the charges made. *Id.*

25. CHALLENGE. The common law right to challenge the jurors has not been recognized by the canonical laws of the Episcopal church, and, until recognized by the canons, can not be enforced by the courts of law. *Id.*

26. RIGHTS OF MINISTERS AND MEMBERS. Ministers and members of a voluntary religious association assume the obligation to be governed by its laws, rules and canons. The right to preach the gospel is secured to every citizen, but the right to preach as a member of a particular denomination is qualified by the rules, doctrines and modes of worship of the denomination. In the administration of ecclesiastical discipline, when no other right is involved than the loss of the clerical office, the ecclesiastical court is the judge of its own jurisdiction under the laws and canons of the church, and its decision on that question is binding on the secular courts. *Id.*

27. JURISDICTION OF EQUITY. Church property, vested in the trustees of a religious society, is held under a trust. A court of chancery will only interfere to enforce the trust and hold the trust property to the purposes for which it was originally given ; it will not lend its aid to pervert it from the purpose for which it was acquired, so as to withdraw it, in part, from use, for the purposes of religious worship. *Id.*

28. TENURE OF PROPERTY. In the state of Michigan religious societies are incorporated in the name of the trustees, and, even though a society be a corporation by virtue merely of the use of corporate franchises for a period of ten years, it has the title to all property conveyed to trustees for its use, and need not file a bill to reach such property ; *Trustees etc. v. Rechlin et al.*, 9-485.

29. LIMITATION ON RIGHT TO ACQUIRE LAND. By statute (of Illinois) any corporation that may be formed for religious pur-

poses may receive, by gift, devise, or purchase, land not exceeding ten acres. The limitation was—in other words—contained in the revised laws of 1845, and it applies to such societies as were formed under an act of 1869, though the act contains no words of limitation, and hence when a religious society, organized under the act of 1869, has acquired ten acres of land, all contracts and conveyances to it of any other real estate are void, as falling within the statutory limitation upon its capacity; *St. Peter's Rom. Cath. Cong. v. Germain*, 9-185.

30. **BEQUEST TO CORPORATION NOT IN ESSE.** The testator bequeathed, in trust, to "the first Calvinist Baptist society that may be organized in" a certain school district, the sum of \$1,000 for the purpose of buying a lot of land and erecting thereupon a meeting house. Upon objection to the validity of the bequest that there is no such incorporated society, held, that a devise to an unincorporated religious society will be regarded as a bequest to charitable uses and will be enforced; *Swasey, adm'r etc., v. Amer. Bible Society et al.*, 3-352.

31. **ACQUISITION OF REAL PROPERTY.** Where the officers and members of a new society, set off from the parent organization, take possession of the property allotted it on the separation, not, however, being formally incorporated, claiming to own such premises, under a written resolution of separation and allotment and, subsequently, a corporation is duly organized, under general law, such corporation succeeds, without formal conveyance, to the property of the unincorporated society, and it has the benefit of the former adverse possession; *Reformed Church v. Schoolcraft et al.*, 5-581.

32. **ALIENATION.** It seems the only way by which a religious corporation can divide its real estate and vest a portion of it in a part of the congregation, set off from the parent organization, would be by act of the legislature. *Id.*

33. —. A resolution of a religious corporation dividing the property of the corporation, and setting off and transferring to a part of its congregation a portion thereof, though inoperative, as a conveyance, for want of a grantee named, and because there was no corporation to take, and although unauthorized by law, will be sufficient to lay the foundation of an adverse possession. *Id.*

34. **ADVERSE POSSESSION.** A society of persons which can not take title by grant can not acquire title by adverse possession, but the individuals who compose such society may, and when such persons become incorporated the corporation may tack to its possession the prior possession, so as to enable it to establish its title by adverse possession. *Id.*

35. —. Statutes of limitations, as to real estate, operate against corporations, as well as natural persons, and, even, against the state; wherefore, although the alienation of the realty of a

religious corporation may be contrary to public policy, yet such a corporation may lose its title by adverse possession. Mere incapacity to convey is not one of the excepted disabilities preventing the operation of the statute of limitations. *Id.*

36. CHURCH PROPERTY. In 1857, P. conveyed to C. and others, in trust for the use of "Bethel Union Church," several acres of land, on which that church, then affiliated with the new school branch of the Presbyterian church, erected a new house of worship. Nearly a year after the execution of the deed, the members of this church unanimously joined the old school organization. The deed was duly acknowledged and recorded, and in 1863 was accidentally destroyed by fire. In 1865 P. conveyed the house and land to other trustees, for the use of the "Bethel Union Church adhering to the general assembly." In 1867 a separation occurred in the church, as a national organization. P. and his associates adhered to the assembly; G. and his associates co-operated with the protesting party. Each party embraced about half of the membership. P. asserted the right to the exclusive use of the church; G. claimed the right to an equal and alternate use of the same. Held, (1) that the question raised is for the civil and not the ecclesiastical courts; the usufructory rights involved depend upon the laws of the land, and not upon the ruling of the general assembly of the church; (2) it conveyed the property in controversy to the organization as a Presbyterian church, without reference to external connection with the old school general assembly; (3) that some time after the conveyance of 1857 the members of the church unanimously left the new and joined the old school organization, did not affect the identity of the church, or subject their property to the jurisdiction of the general assembly, or change the tenure in such manner as to make it dependent upon adherence to that council; (4) if the parties held their interest in the church property by the tenure of adherence to the general assembly, a severance of that connection, because of the unauthorized action of the general assembly with reference to the late war and the subject of slavery, did not affect their title to the property; (5) the re-organized church, consisting of G. and others and called "Bethel Union," has not lost its identity as the church entitled to the use of the church property; as to whether P. and his associates, adhering to the general assembly, are entitled to any portion of its use, can not be determined under the issues; *Gartin et al. v. Penick*, 1-493.

37. In 1854 M., for valuable consideration, conveyed to four persons a parcel of land and a house thereon, situated near a house of worship of the Methodist Episcopal Church South. The property was purchased as a parsonage, and pursuant to a parol agreement, a portion of the price paid for the property was raised by subscription and refunded to the grantees named in the deed. The property was used, save at short intervals, as a parsonage.

The title was not purchased or held for the use of the church generally, but for that congregation. During the late civil war the grantees remaining in the state, and their associates, embracing a large majority of the congregation, severed their connection with the "Methodist Episcopal Church South," and organized themselves into a congregation in connection with "The Methodist Episcopal Church of the United States:" Held, (1) the purchase and appropriation of the property, as a home for the minister of that congregation, was a dedication of the property to the use and benefit of those who then composed that organized congregation, or who might thereafter compose it; (2) a dedication of land for public purposes may be made by parol and established by parol; (3) it is not essential that the title should be vested to the uses intended. A dedication concludes the party making it from re-asserting any right so long as the use remains; (4) the use can not be diverted to another or different use, unless by a division or disruption of the society; a partition or apportionment of the property is authorized by express law; (5) "schism or division," as contemplated by subsection 4 of section 3 of chapter 14 of the revised statutes of Kentucky, imports no more than a separation of the society into two parts, without any change of faith or ulterior relations; (6) a majority of a society separating therefrom and from the entire ecclesiastical body with which it is connected (the Methodist Episcopal Church South), and uniting with another distinct religious organization (the Methodist Episcopal Church of the United States), can not be regarded as a party within the meaning of the statute, occasioned by a schism or division of a society, and entitled to a proportion of the use of the property; *M'Kinney et al. v. Griggs et al.*, 1-534.

38. **DISTURBANCE OF ENJOYMENT.** Where the majority of a congregation, pretending, contrary to the fact, that some of the trustees have resigned and refused to act, proceed to elect others in their places, without notice to the minority of the association, and the parties elected proceed so to act, as to exclude the minority from the use and enjoyment of the church property, the remedy as to the illegal election is by quo warranto, or in equity by injunction, and as to the disturbance of use and enjoyment, it is not by bill for partition of the common property; *Nelson et al. v. Benson et al.*, 5-231.

39. **SECESSION; PROPERTY.** A majority of the members of a congregation seceding therefrom forfeit their interest in and control over the church property; *Lewis et al. v. Watson et al.*, 1-569.

40. **DIVISION OF; RIGHTS OF MAJORITY AND MINORITY.** In the case of a division of a religious corporation, both parties still adhering to the tenets and discipline of the organization, the property should be divided between them in proportion to their numbers at the time of such separation; *Niccolls et al. v. Rugg et al.*, 1-409.

41. **DIVISION OF; JUDICIAL NOTICE.** The plan of the separation of the Methodist Episcopal Church in 1844; that the separation was accomplished by competent authority; that the southern conferences assumed an independent organization under the name of the "General Conference of The Methodist Episcopal Church South"—are adjudged questions of which the courts will take judicial notice; *Humphrey et al. v. Burnside et al.*, 1-560.

42. —. In said division the local society and church property in Kentucky passed to the Methodist Episcopal Church South, excepting those churches and societies bordering on the Ohio river, which were allowed to choose which they would go with, by a vote of the respective societies. *Id.*

43. **DIVISION IN CASE OF SCHISM.** Property being acquired by an incorporated religious society, by the constitution of which a division in agreed proportions was to be made in case of a schism, it was held that by the word "schism" was meant a division or separation of the church into two religious bodies, occasioned by diversity of opinions on religious subjects, and that a difficulty growing out of an illegal election of directors, and the exclusion of the minority from the use and enjoyment of the common property, would not justify a partition thereof; *Nelson et al. v. Benson et al.*, 5-231.

44. **PARTITION.** The constitution of the society providing for division of the property in the event of a schism, there must be a division or separation of the church into two religious bodies and a separate organization of the seceding members, in order to warrant a partition of the church property. It is not competent for individual members of the congregation, as such, to invoke the aid of chancery to make partition, but only an organized body seeking to devote the property to the uses to which it is devoted. *Id.*

45. —. In making partition of the property of a religious corporation, in case of a division, mathematical nicety is neither attainable nor important. The only satisfactory mode would be to count church members by virtue of their membership, and, in addition, to count as members of the congregation all pew holders; *Niccolls et al. v. Rugg et al.*, 1-409.

46. **ACTION; PARTIES.** A suit may be maintained in behalf of a church congregation in reference to church property, by the trustees of the church or by a committee appointed for that purpose; *Humphrey et al. v. Burnside et al.*, 1-560.

47. **QUALIFICATION OF MEMBERS OF COMMITTEE.** It is not necessary that the members of the committee appointed to prosecute a suit should be members of the congregation. *Id.*

See CHURCH ORGANIZATION.

REMEDIES.

1. **AGAINST CONSOLIDATED COMPANIES.** When lawful consolidation has been effected, the rights and properties of the constituent

companies transferred and their liabilities assumed, the new company may be considered so far the old company, as to authorize, generally, the like remedies by and against the new company, in respect of the rights and liabilities of the old companies, as would have been proper as to the old companies, had the consolidation never taken place; *Miller et al. v. Lancaster et al.*, 4-170.

2. **BOND OF INDEMNITY.** Upon a bond or covenant to indemnify, or save harmless against damages or debt, chancery will maintain the bill, of the covenantee, to compel the covenantor to pay the damages or debt and, that, before the covenantee has been compelled to pay or been molested by suit. It matters nothing that the covenant sounds in damages. In such case the court, may direct a trial at law, or in [Tenn.] practice, impanel a jury to ascertain the amount of the damages. *Id.*

3. **CREDITOR'S BILL.** Where property of a corporation had been divided among its stockholders before all its debts have been paid, a judgment creditor, after return of an execution unsatisfied, may maintain an action, in the nature of a creditor's bill, against a single stockholder, to reach whatsoever was received by him under the distribution. It is immaterial whether he received it by fair agreement with his associates or by his wrongful act; *Bartlett v. Drew*, 4-634.

4. —. In such case the creditor is not required to bring his suit on behalf of himself and such other creditors as may choose to come in, or to make all the stockholders parties to the action. The fact that the debtor is a foreign corporation is immaterial. *Id.*

See **ACTION** ; **ATTACHMENT** ; **CREDITOR'S BILL** : **EQUITY** ; **LIABILITIES**.

REMOVAL OF CAUSE.

1. **FOR CERTAIN PURPOSES.** A corporation may be a citizen of a state, for the purpose of suing and being sued in the courts of the United States, and the laws of the state can not withdraw a citizen of another state from the operation of an act of congress nor deprive him of a right of removal of his cause to the federal court; *Herryford v. Aetna Ins. Co.*, 3-511.

2. **QUÆRE.** Whether by the act of March 2, 1867, for the removal of causes, the congress of the United States intended by the use of the words "citizen of another state" to include "artificial beings;" such as corporations are; *Dodge, adm'r etc., v. Northwestern Union Packet Co.*, 3-502.

3. **CITIZENSHIP FOR.** Corporations are citizens for the purposes of suing and being sued and are embraced within the federal legislation with reference to the removal of causes from state to federal courts; *Stanley v. Chicago, Rock Island & Pacific R.R. Co.*, 8-154.

4. **BY CORPORATION.** As a corporation is a citizen of the state of its creation, it may be a "citizen of another state" within the

meaning of those words as used in the act of congress, of March 2, 1867, regulating the removal of causes from state to federal courts. If it be such citizen of another state, it would certainly, upon complying with the requirements of the statute, be entitled to have the suit removed; *Quigley v. Central Pacific R.R. Co.*, 8-343.

5. **BY CORPORATION.** A national bank is a citizen of the state in which it exists and, as such, may, in a proper case, exercise the right of applying for a removal of a cause, pending against it, from state to federal jurisdiction; *Cooke v. Nat. Bk.*, 4-571.

6. **WHEN NOT REMOVED.** A suit in a state court in which a foreign corporation is joined with other defendants who are residents of the state can not be removed to the federal courts, unless such residents are merely nominal parties; but when the action is against the corporation and its officers, and no relief is prayed for as to any of such officers that is not prayed for, as against the corporation, and no relief is prayed for against any officer in his individual capacity, such officers are merely nominal parties; and the action may, by proper proceedings, be removed; *Hatch v. Chi., R. I. & P. R.R. Co.*, 1-79.

7. **FOREIGN CORPORATION.** An action brought by a citizen of the state against a foreign corporation, and involving a sum exceeding \$500, may, on a motion seasonably filed, and on good and sufficient security offered, be removed for trial from the courts of the state to the circuit court of the United States for the proper district; *Hobbs et al. v. Manhattan Ins. Co.*, 1-583.

8. **TIME WITHIN WHICH MOVED.** A petition for the removal of a cause to the circuit court of the United States, for any of the causes mentioned in the act of congress, of March 3, 1875, must be filed at the first term, or it will be too late, and must be rejected; *Inhabitants of School Dist. v. Aetna Ins. Co.*, 7-280.

9. **CHARTER CONSTRUED AS TO.** The act of congress (13 Stat. at Large, 104) incorporating the defendant, declares it capable "of suing and being sued in the district and circuit courts of the United States, in law or in equity." This does not vest in those courts exclusive jurisdiction of suits by, or against the corporation, nor confer upon the corporation a right of removal to the federal courts. The right of removal, in such cases, is controlled by section 640, revised statutes of the United States; *Scheffer et al., exec'rs, v. Nat'l Life Ins. Co.*, 7-632.

10. **APPLICATION FOR.** An application for the removal of a cause, which complies with the requirements of the law in relation thereto, in force, is not invalid because it prays for a removal under a law which has been repealed; *Stanley v. Chicago, R. I. & P. R.R. Co.*, 8-154.

11. **AFFIDAVIT.** An affidavit made by authority of a resolution of the board of directors of a corporation, at a regular meeting of the board, declaring that the corporation has reason to and does

believe that, from prejudice and local influence, it will not be able to obtain justice in such state court, will be a sufficient affidavit whereon to base a removal of cause; *Quigley v. Cent. Pac. R.R. Co.*, 8-343.

12. **AFFIDAVIT.** Authority from the corporation to make the affidavit, the basis of the removal of a cause from state to federal jurisdiction, must, in some manner, affirmatively appear. *Id.*

13. —. An application under the act of congress of March 2, 1867 (14 U. S. Stat. at L., 558) to remove a cause from a state court in to the circuit court of the United States may be made by a corporation of another state. The corporation may make the affidavit, required for such purpose, by its authorized agent. Overruling *Cooke v. State National Bank*, 4 Amer. Corp. Cas., 571; S. C., 52 N. Y., 96, so far as this point is concerned; *Mix v. Andes Ins. Co.*, 8-434.

14. **INSUFFICIENT AFFIDAVIT.** An affidavit made by a vice president of a corporation, "that he has reason to believe and does believe that, from prejudice and local influence, said defendant corporation will not be able to obtain justice in said court," is insufficient to authorize the state court to transfer the cause to the federal court; *Quigley v. Central Pacific R.R. Co.*, 8-343.

15. **JURISDICTION OF STATE COURTS.** After an application regularly made for the removal of a cause from state to federal jurisdiction, the state court loses all jurisdiction and can not allow pleadings to be amended: *Stanley v. Chicago, Rock Island & Pacific R.R. Co.*, 8-154.

16. **WAIVER OF, BY TRIAL.** By participating in the trial of a cause, after the court has improperly refused an application for its removal from the state to a federal court, the defendant does not waive the question of jurisdiction; nor does the fact that he might have pursued another remedy prejudice his right to have the judgment of the lower court reversed on appeal. *Id.*

17. **RIGHT ABSOLUTE.** No thing done by a corporation in regard to the place or manner of transacting its business, and no statute of a state in which it transacts such business, can deprive it of its rights and privileges when sued in a state foreign to the one in which it was created, to remove such action, in the manner prescribed by the acts of congress, from the state court to the proper court of the United States; *Hatch v. Chi. R. I. & P. R.R. Co.*, 1-79.

18. **STATUTE.** The statute of the state of Maine, imposing upon foreign insurance companies, as a condition to their right to transact business in the state, that they shall submit to the jurisdiction of the state courts, does not, in terms nor by implication, limit or restrict the jurisdiction of the courts of the United States; *Hobbs et al. v. Manhattan Ins. Co.*, 1-583.

RE-ORGANIZATION.

1. **AFTER FORECLOSURE.** A railroad corporation re-organized under an act of legislature of Ohio, regulating the sale of railroads and the re-organization of companies. In its agreement it was stipulated that certain mortgage bonds of the original organization should be assumed by the new company and that the owner of such bonds should be entitled to vote at all meetings of stockholders, upon the performance of certain conditions, as to the extension of time in which such bonds should become due. Such conditions being fulfilled, by the holder of the bonds, he becomes entitled to vote and the company is liable to pay the bonds, without further action of the new company; State, ex rel. Att'y Gen., v. M'Daniel et al., 4-20.

2. —. An executory agreement to sell and deliver such bonds to a corporation, made subject to ratification by its directors and stockholders, does not until consummated by ratification, divest the holder of his title thereto nor of his right to vote by virtue of their ownership. *Id.*

3. —. In Michigan, a statute of 1859 (Laws 1859, 252), permits purchasers, at foreclosure sale, of railway track and its appurtenances, to re-organize the corporation, with new stock, newly elected directors and succession to charter rights and powers. It is a condition precedent, to the acquisition of such rights and powers, that such purchasers shall provide all necessary means for the performance of the duties imposed by the grant to the original corporation and transfer all which is necessary to that end to the re-organized company. The conditions being complied with and re-organization perfected, the purchasers take and transfer, and the new company receives, the property free from liability for any debts, excepting such as are evidenced by prior mortgage or lien. All property of the old company not included in the foreclosure sale remains liable for existing debts; Cook v. Detroit, Grand Haven & Milwaukee Ry. Co., 6-645.

4. **ACTION NOT LIE.** If such re-organized company shall come into possession of any property, of the old corporation, which is not embraced in the foreclosure nor exempt from liability for existing debts, the trust can not be worked out by an action in common law form on the debt. *Id.*

5. **EFFECT.** The constitution of an agricultural society declared its object to be "to improve the condition of agriculture, horticulture and the mechanical and household arts," and provided for holding annual fairs. The society was re-organized as a joint stock company, the object being, as expressed, "to improve the condition of agriculture, horticulture, floriculture, mechanical and household arts" and the new articles, also, provided for holding annual fairs. The name was changed by substituting the word "board" in lieu of the word "society." It was held that there was no essential change in the objects of the society and

that the new board was not a separate and independent society from the elder one, but was the same under a slight change of name and on such re-organization the later corporation succeeded to all the rights and liabilities of the elder society; *Livingston Co. Agric. Soc. v. Hunter*, 10-229.

6. AGRICULTURAL SOCIETY. The re-organization of an agricultural society, under statute, adopting a stock plan does not render the corporation one of private gain or profit or change the public character of the association. *Id.*

7. INDIVIDUAL LIABILITY. It was provided, by constitution of the state of Missouri, that each stockholder in a corporation should be "individually liable for its debts, over and above the stock owned by him." A corporation was created which incurred debts. By a subsequent re-incorporation it became authorized to receive subscriptions for and issue additional stock, which it did not presently do. The constitution was, afterward, amended, to provide that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him." The corporation then issued its new stock to subscribers. The holders of such new stock are not liable personally under the repealed clause; *Ochiltree v. R.R. Co.*, 5-78.

8. INFERENCE AS TO. A legislative intent, upon change or re-organization of a corporation, to absolve it from existing liabilities, or to interfere with corporate contracts can not rest on inference or presumption; *Trustees of University v. Moody*, 6-166.

See SOCIETIES.

RES ADJUDICATA.

1. FINAL JUDGMENT. A decision and judgment of the supreme court, reversing and remanding a cause, is the law of the case upon the questions involved and adjudged in all subsequent stages; even in supreme court on another appeal; *Richmond Street R.R. Co. v. Reed*, 9-243; *Newbury v. Blatchford*, 9-243, note.

2. WHEN A BAR. Where a matter has been once litigated, and a judgment or decree rendered, in a court of competent jurisdiction, the judgment or decree must be regarded as final between the parties to the litigation, and those who claim under them, after the rendering thereof; *Cooper et al. v. Corbin et al.*, 9-192.

3. WHEN NOT. Where a receiver of a railroad company, appointed and acting under the direction of the circuit court of the United States, in 1877, filed a bill in the circuit court of Peoria county to enjoin the collection of the taxes levied upon the capital stock of the company for the years 1873, 1874 and 1875, which, on a hearing, was dismissed, it was held, that the decree in such case was no bar to another bill filed by the purchasers of the railroad and its property, under a deed of trust, and whose title was acquired long after the filing of the first bill, to enjoin the collection of the same taxes by the sale of the rolling stock of the rail-

road company after its purchase, such purchasers not claiming under the receiver, for the reason that neither the parties nor the subject matter are the same. The latter bill presented the question that the purchasers acquired the property, by their purchase, free and clear of the taxes, which was not litigated in the former suit. *Id.*

4. FORMER JUDGMENT BINDING WHEN. If a court having jurisdiction of the parties and subject matter in a suit, makes a decision upon the merits as to questions of law or fact, its judgment and decree will be conclusive upon such question in subsequent suit with the same parties; *Atty. Gen. v. Chicago & Evanston R.R. Co.*, **10**-240.

5. —. Where any specific fact or question has been determined in a former suit, the parties are concluded from raising the same question in a subsequent suit, if properly pleaded, whether the cause of action is the same or not, and this rule applies not only to matters necessarily involved in the prior litigation, but also to those which were incidental only, but still necessary to the decision of that point; so where a bill sought to enjoin the performance of certain threatened acts on several distinct grounds, and the court denied all relief and dismissed the bill on its merits, it must be taken that each and every specific ground alleged as cause for relief was considered and held insufficient, and the decree will be a bar to the investigation of each of such grounds in any subsequent suit against the same or either one of the parties. *Id.*

6. NEW FACT. In a former action an objection was made to an assessment. In the present action an objection was made to the same assessment supported by a new fact not alleged in the former proceeding. Held, that the former action was conclusive; *Sullivan v. Triunfo Gold etc. Mining Co.*, **3**-132.

RESOLUTION.

1. HAVING FORCE OF BY-LAW. By the articles of incorporation it was provided that the company should have, "the right to purchase, sell, mortgage, control and lease property, either real or personal, and to exercise all other incidental powers as shall be necessary in conducting such business," and also provided that the stockholders at any annual meeting, might adopt such by-laws for the government of directors as they might deem necessary, and a resolution was adopted that they deemed it not necessary to adopt by-laws, for the reason that the articles of incorporation provided that the control and management of the corporation should be in the board of directors. Held, that such resolution amounted to an expression of the stockholders to leave the entire control and management of the corporation with the directory, the same as the stockholders themselves might do; *Reichwald v. Commercial Hotel Co.*, **10**-203.

RIGHT OF ACTION.

1. **SUITS BY AND AGAINST.** A corporation, its directors, and stockholders are, within themselves, different parties, and may sue and be sued inter se, on case made, as well as sue, or be sued by third parties; *Board of Com'rs et al. v. Lafayette etc. R.R. Co. et al.*, 7-26.

2. **STOCKHOLDERS.** While it is true, as a general rule, that suit will not lie against an agent, or trustee, by the principal, or cestui que trust, until after demand or refusal, yet, where it is known that the party can not, or will not, comply with the demand if made, the other party is excused from making the demand. *Id.*

3. —. In a suit by stockholders of a corporation against the corporation, for the avoidance of a contract, alleged to be ultra vires the charter, it is not a good answer to the original complaint, that, after suit commenced, the directory, having become changed and being brought into accord with the stockholders suing, have filed a cross complaint, on the same cause of action and asking, substantially, the same relief. This will not preclude the stockholders from pursuing their private remedy. *Id.*

4. —. An action will lie in favor of a stockholder of a corporation, for relief, against the wrongful acts of the president thereof, when it is shown that large profits have been made by the corporation; that the president will not suffer the books of the company to show the same; that he is largely indebted to the corporation for the use of its property for his individual purposes and profit; that he has received all the emoluments of the company and accounted for none; that a majority only of the directors, not being bona fide stockholders but only by his voluntary gift of stock, are under his influence and control, instruments to do his bidding, who have abdicated their proper functions and surrendered the entire charge of the corporate affairs to him; and in such case there need be no averment of demand, made on the board of directors, to bring suit, prior to suit instituted by the stockholder; *Rogers et al. v. Lafayette Agric. Works et al.*, 7-67.

See **ACTION**; **ATTACHMENT**; **CREDITOR'S BILL**; **EQUITY**; **LIABILITIES**.

S.

SALARY; see **COMPENSATION**; **OFFICES AND OFFICERS**.

SALVAGE.

1. A corporation may maintain a suit for salvage, and recover the same compensation allowed private persons, for like service, though the persons actually performing the service receive

liberal salaries but no shares of the profits of the enterprise ; *The Camanche*, 1-34 ; *The Blackwall*, 1-53.

2. **RULE OF COMPENSATION.** A corporation had, by its charter, authority to own vessels to be employed in aiding vessels wrecked or in distress, and to take all "compensation to wages and salvages which are customary and usual, and which, by law and usage, inure to private persons." It was employed by the owner of a vessel which had gone ashore in a fog, to relieve her from a situation of peril. It was held, that compensation ought to be allowed to the corporation, on the principle of allowing a liberal compensation for the use of the apparatus furnished, and for the skill with which it was handled in the service performed ; but not on the principle governing compensation in a case of salvage service ; *The Morning Star*, 1-91.

SAVINGS BANK.

1. **NOT A BENEVOLENT ASSOCIATION.** A savings association, formed for the pecuniary profit of its members, is not a benevolent or charitable society, within the meaning of public statutes, which authorize two or more persons desirous of forming any benevolent or charitable society to become a corporation ; *Sheren v. Mendenhall et al.*, 7-607.

2. **CONSTITUTIONAL LAW.** The constitution of the state of Kansas contains an article (13), by the title "banks and currency." It consists of eight sections. The first requires a general banking law ; the second and third make provision for securing circulating notes ; the fourth prescribes what such notes shall be redeemable in ; the fifth provides the state shall not become a stockholder ; the sixth requires all banks to keep offices and agents to issue and redeem circulation within the state ; the seventh prohibits smaller notes than of the denomination of one dollar (originally five dollars) ; and, the eighth prescribes that no banking law shall have any force unless approved by a majority of the voters, at a general election. This article of the constitution applies to banks of issue ; it does not prohibit the legislature from creating banks of deposit and discount ; *Pape v. Capital Bank of Topeka*, 7-130.

3. **INCORPORATION OF.** By the general law of Kansas, it is required, as a condition precedent of the doing of the business of a savings bank by a corporation, that there be an organization under the law as in the case of any other corporation ; *Kaiser v. Lawrence Savings Bank*, 6-574.

4. —. It is an essential of the lawful incorporation that its articles of association, in the statute also designated as the charter, shall be subscribed and acknowledged by at least five persons, three of whom must be citizens of the state of Kansas. Omission hereof is fatal to a right to organize and do business as a corporate body. *Id.*

5. **POWER.** It is not competent for the trustees of a savings bank to purchase on credit property of any kind not needed for immediate use, or the investment of existing funds; *Franklin Co. v. Lewiston Institution*, 7-307.

6. ——. Under the general power of discounting negotiable notes and notes not negotiable, granted to a savings bank, such an institution has power to purchase such notes; *Pape v. Capitol Bank of Topeka*, 7-130.

7. **LIABILITY.** An action for malicious prosecution will lie against a savings bank; *Reed v. Home Savings Bank*, 7-544.

8. **RELATION OF DEPOSITOR TO.** A depositor in a savings bank becomes a creditor of that bank as really and as effectually as a depositor in a bank of discount or deposit. There is no relation of trustee and cestui que trust between bank and depositor, any more than in any other case of debtor and creditor. *Id.*

9. ——. A lien in favor of a depositor can only be created by mortgage or pledge. A promise by the officers of a bank, to savings depositors, to keep and use the securities taken on loans, or by way of investment, for their benefit, can not be held to create a mortgage or pledge of such securities, nor as creating a trust; *Ward, rec'r, v. Johnson*, 6-462.

10. ——. A by-law authorizing a savings deposit to be withdrawn, after giving a certain notice, without regard to the condition of the investment at the time, indicates that the depositor has no trust in the investment. If he had a trust in the investment he could not withdraw his deposit without regard to the investment; for, if loaned on note secured, he must await its maturity and collection or withdraw the note and security. So an agreement to pay interest, semi-annually, on such deposit, at all events, clearly shows the deposits are not in trust. *Id.*

11. **OFFICERS' BOND.** It is a reasonable by-law, on the part of a savings bank, to require its cashier to furnish bond with surety for the faithful discharge of the duties of his office. Such a by-law is not inconsistent with law; *Savings Bank v. Hunt*, 8-271.

12. ——. Where the cashier of a savings bank gave a bond with sureties, which was silent as to the term of his office and as to the period of the liability of suretyship, but, the organic law of the corporation fixed the terms of his office at one year and until his successor was duly elected and qualified, and at the expiration of each of two annual terms he was re-elected and continued to discharge the duties of the office, but gave no new bond, and during the third year of his cashiership he became a defaulter, the sureties were not liable, the bond being without force when the defalcation occurred. *Id.*

13. **EVIDENCE; ACCOUNT.** The treasurer of a foreign savings bank having answered to an interrogatory, in a deposition, that the books of the bank, which were in his custody, showed that the bank had had business with a certain person, was asked to give

an exact transcript of the entries in the book relating to the business. His answer was "see statement annexed." What purported to be a transcript of the books relating to the business was annexed to the deposition. It was held that it sufficiently appeared that the transcript had been compared with the originals and was a true copy; *Ide v. Pierce, exec'r*, 9-458.

See BANK AND BANKING; BOND.

SEAL; see CORPORATE SEAL.

SECRETARY.

1. AGENCY IN SUBSCRIPTION TO STOCK. The owners of undivided interests in property having agreed, among themselves, to form, immediately, a special partnership for the purpose of improving the same until a charter could be procured and an organization perfected under the same, when the property was to be transferred to the corporation so formed and each owner to take stock in proportion as he had title to the property thus to be converted, it was held that upon the formation of the company, as contemplated, and the conveyance of the legal title to it, the secretary of the association was authorized to subscribe the name of the owner of an interest for the stock of such corporation, when it was organized; *Marseilles Land and Water Power Co. v. Aldrich*, 6-406.

2. —. Secretary, of an organization authorized to proceed to incorporation, may be empowered to subscribe for shares for individuals, according to their interests. *Id.*

3. CORPORATE DEED. If the testatum clause shall set forth that the company, as such, has caused its corporate seal to be affixed and the instrument to be signed by its president and secretary, and it is so signed and ensealed, and if the ensealing and delivery be attested by two subscribing witnesses the deed will be executed; *Kelly v. Calhoun*, 6-26.

4. PROMISSORY NOTE. The secretary of a corporation executed a promissory note in which were the words "we promise" etc. and to which was affixed the seal of the corporation and his own name, with the word "secretary" appended. It was held to be the note of the corporation, on which the secretary was not personally liable; *Means et al. v. Swormstedt*, 1-370.

5. RATIFICATION OF PLEDGE. Where the secretary of a corporation, without express authority, pledged the bonds of his company, secured by deed of trust, which was recorded, for an existing indebtedness and future advances, the directors of the company having knowledge of and acquiescing in such pledge, the act was held to be binding in the absence of proof of fraud; *Darst v. Gale et al.*, 6-380.

6. ESTOPPEL TO DENY CONTRACT. The secretary of a corporation was, in fact, one of two "managing men" of such corporation. His authority was assumed, by the court, to be equivalent to that

of a general agent. He informed a contracting party that the contract executed signed by the president, "was duly executed to bind" the company. The party relied and in good faith acted upon such information. Held, that the corporation was estopped to deny the contract; *Perry v. Simpson Waterproof Manuf. Co.*, 4-309.

7. **DECLARATION OF.** The superintendent and secretary of a corporation, being its general agents for the transaction of its business, their declarations concerning a debt previously contracted and within the scope of their authority is admissible in evidence, under the exception to the rule excluding the declarations of an agent made subsequent to the transactions to which they relate; *Webb, rec'r, v. Smith*, 9-43.

8. **SERVICE OF SUMMONS.** Acceptance of the service of summons and complaint, by one who signs such acceptance as secretary of the corporation, is not, of itself, sufficient evidence that he bears the relation by him claimed to the company; *Talladega Ins. Co. v. Woodward*, 3-116.

See **MINING COMPANY**; **OFFICES AND OFFICERS**.

SEMINARY; see **ACADEMY**; **COLLEGE**; **EDUCATIONAL INSTITUTION**.

SERVICE OF PROCESS; see **FOREIGN CORPORATION**; **PROCESS**.

SET OFF.

1. **FRAUD.** To an action by a corporation against a stockholder, defendant may plead and recover, as set off, any sum of money obtained from him, by fraud, as a subscription to stock; unless, being a subscriber, there are debts of the corporation unpaid, incurred after his subscription was made, to the amount of the sum so paid; *Hamilton et al. v. Grangers L. & H. Ins. Co.*, 9-55.

See **PERSONAL LIABILITY** (59-61); **PLEADING**.

SEWERS.

1. **STATUTE OF MASSACHUSETTS.** A sewer built between Garden brook and the Connecticut river, under the authority of chapter 107, section 1, statutes of 1863, "for the purpose of protecting private property and the streets of the city from damage by water during the seasons of freshet," and, under section 6, "to be used, controlled, maintained and repaired in the same manner as drains constructed wholly at the expense of the city," is not necessarily restricted from uses for which the city may receive pay from persons entering it with their private drains; *Patton et al. v. City of Springfield*, 2-484.

2. —. A jury impaneled under section 3 of the statute to revise a determination of the city council of Springfield under section 2, of the division between the city and the owners of the

benefited land, and of the cost of building a sewer between Garden brook and the Connecticut river, under the statute, may in such revision take into consideration whether the city derives, or has means to derive any revenue from the use of the sewer by persons who may pay for draining directly into it from land through which it passes, but which is not included in the district for the benefit of which it is built and on which its cost is in part assessed; and if it be so located and built as to take and carry off sewage brought to it by other sewers or drains already built, or likely to be required to drain lands situated beyond or higher up on Garden brook, they may, also, take into consideration the interest of the city in such other sewers and drains. *Id.*

3. STATUTE OF MASSACHUSETTS. On the revision by a jury, impaneled on the petition of persons who alleged that their land was not benefited, of a determination of the city council of Springfield, under said statute, of the extent of land benefited by the building of a sewer, and of the division of the cost of the sewer between the city and the land owners, the presiding officer refused the request of the city to instruct the jury that they "were not to determine whether or not the amount of benefit was equal to the probable cost to the petitioners, but, only, whether or not the premises included were benefited." It was held that this refusal was erroneous, although he did instruct them that the objection that the land of the petitioners was not benefited should be sustained unless they should find that it might receive some appreciable substantial benefit from the sewer. *Id.*

4. —. After the acceptance by the superior court of the verdict of a jury impaneled under the statute, an appeal lies to the supreme judicial court on questions of law appearing from the records of the proceedings; and, if on such an appeal it appears that the findings of the jury were upon distinct and separate issues, in reference to part of which errors of law are manifest, a new trial should be ordered of such part only and the acceptance of the verdict affirmed as to the residue. *Id.*

5. IN HARTFORD. Under the charter of the city of Hartford, the whole expense of a sewer may be assessed upon the parties specially benefited; *Clapp et al. v. City of Hartford*, 2-107.

6. APPEAL. When on appeal the assessment of any person is reduced, it does not necessarily follow that the amount of the reduction shall be added to the assessment of the others; and an appeal by one of the several parties assessed does not bring up the whole assessment for revision. *Id.*

7. RULE OF ASSESSMENT. The value of the land benefited should be considered in assessing against the owner the expenses of making a sewer. An arbitrary rule, by which the expense is apportioned among the adjoining owners, according to the number of the front feet of their lots, without reference to other considerations, is unreasonable and can not be sanctioned. *Id.*

8. **RULE OF ASSESSMENT.** That the property in front of which a sewer passed was a church, and the sewer would be of no present benefit to it and probably would not be for many years, may properly be taken into consideration in making the assessment. *Id.*

9. —. When a lot already has means of drainage, either natural or artificial, this fact should be considered in making the assessment. *Id.*

10. —. A vacant lot is immediately increased in value by the construction of a sewer, and the fact that the sewer will not be used at once constitutes no ground for abatement of the assessment; *Meuser v. Ridson et al.*, 2-110.

SOCIETIES.

1. **LAWS.** Societies may make their own constitutions and by-laws, and so long as they remain unchanged, each member is alike bound and shielded by them. The society, too, must observe them until they are changed in legal form; *Weatherly v. Medical Society*, 10-44.

2. **EXPULSION OF MEMBER.** Where a by-law designated the first regular meeting in April as that for the revision of the rolls of members and reporting members delinquent in dues, such revision can not be had at a called meeting held at another time, and a member be expelled for delinquency in payment of dues. *Id.*

3. **RE-ORGANIZATION.** The constitution of an agricultural society declared that the object of the society should be, "to improve the condition of agriculture, horticulture and the mechanical and household arts," and provided for holding annual fairs. The society was re-organized as a joint stock company, and the new constitution declared the object of the society should be, "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," and also provided for holding annual fairs. The name was changed by substituting the word "board," in place of the word "society." Held that there was no essential change in the object of the society, and that the new board was not a separate and independent society from the old one, but was the same under a slight change in name; *Livingston Co. Agr'l Soc. v. Hunter*, 10-229.

4. —; **SUCCESSOR TO ALL RIGHTS AND LIABILITIES OF OLD SOCIETY.** Held, further, that upon the re-organization of this society under section 9, chapter 5, of the revised statutes of 1874, the corporation succeeded to all the rights and liabilities of the former society as they existed at the time of the change, and the creditors of the society would have the same right to sue the company under its new name and organization that they did under the old. *Id.*

5. —. Held, further, that the creditors of such society, whether their claims accrued before or after the re-organization of

the institution, stand upon the same footing, and the only way one can gain an advantage over another, is by the exercise of superior diligence in prosecuting his claim to judgment and thereby obtaining a judgment or execution lien upon the company's property. *Id.*

6. RE-ORGANIZATION; SUCCESSOR TO ALL RIGHTS AND LIABILITIES OF OLD SOCIETY. The re-organization of an agricultural society under the statute, on the stock plan, does not render the corporation one for private gain or profit, or change the public character of the institution. Its property still can only be applied to the payment of its debts and to the promotion of the joint object of the association. *Id.*

SOCIETIES — BENEFIT.

1. BY-LAWS AND RULES BINDING. One who becomes a member of an organization, such as the Knights of Pythias, is chargeable with knowledge of its laws and rules; and if they are not in themselves illegal, or require the performance of acts contrary to law, he can not refuse obedience to them; *Bauer v. Sampson Lodge*, 10-336.

2. RULE PROHIBITING SUIT OF LAW FOR BENEFITS. There is some conflict of opinion as to the extent to which such organizations may restrict actions for benefits provided to its members; but, the reasonable rule is, that they may provide methods for recovery of benefits, and compel members to resort thereto, before invoking the power of the courts, though they may not entirely prohibit members from suing to recover benefits accruing to them. *Id.*

3. —. It is not within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlement of controversies. *Id.*

See BENEFIT SOCIETIES.

SOCIETIES — BENEVOLENT.

1. BY-LAWS. A person, by becoming a member of a benevolent society, assents to the provisions of its constitution and by-laws, and is bound by them; *Robinson v. Irish Amer. Ben. Soc.*, 10-88.

2. BENEFITS, SUIT FOR. Where the by-laws of a benevolent society required all claims for benefits to be examined by the board of trustees, a claim must pass such examination before a member can sue thereon. *Id.*

See BENEVOLENT ASSOCIATION.

SOCIETIES — CHARITABLE.

1. NOT LIABLE FOR TORT. An institution for charitable purposes only, can not be made liable for an assault committed by one

of its officers. Damages in such cases must be sought against the wrong doer; *Perry v. House of Refuge*, **10**-560.

See CHARITABLE ORGANIZATIONS.

STATUTE.

1. **RULE OF CONSTRUCTION.** It is a maxim, generally true, that if an affirmative statute, which is introductive of a new law, directs a thing to be done in a certain manner, that thing shall not be done in any other manner, even though there be no negative words. Hence, a provision that certain things shall be done to constitute a license of authority, is equivalent to an express prohibition against the license or authority unless these things shall be done; *Diversy v. Smith*, **9**-155; *Burkett et al. v. Plankinton et al.*, **9**-155.

2. —. Where a statute is one which the legislature had the power to enact, the question of its justice or expediency is for the legislature, not for the courts; *Hockett v. State*, **10**-349.

3. —. A law admitting of but one penalty, and that of the harshest possible character, will, necessarily, be subjected by the courts to close criticism and a strict construction; *Chicago & Alton R.R. Co. v. People, ex rel. Koerner et al., Com'rs*, **5**-196.

4. —. The rules of construction which govern in construing acts of the legislature are equally applicable to the legislative acts of a municipal corporation; *State of Maryland, ex rel. City of Baltimore, v. Kirkley et al.*, **2**-406.

5. **AMENDATORY ACTS ARE ALSO PUBLIC.** If an original act chartering a corporation be declared to be a public act, at all times to "be recognized as such in all courts and places whatsoever," and such act be amended by other and supplemental acts, such amendatory acts also become and are to be treated as public acts, inasmuch as they are but modifications thereof or additions thereto; *Stephens & Condit Transportation Co. v. Central R.R. Co.*, **3**-558.

6. **REPEAL.** When there is a clear repugnance between two laws, and the provisions of both can not be carried into effect, the later law must prevail and the former yield to the last expression of the legislative will; *Dingman v. People etc.*, **3**-256.

6½. —. The repeal of a general statute, for the incorporation of companies, by a statute which substantially re-enacts and extends its provisions, does not terminate the existence of corporations organized under it; *United Hebr. Benef. Ass'n v. Benishmol*, **7**-536.

7. **REPEAL; MISPRINT.** The statutes of California of 1851, page 443, section 31, as printed, repeal the act of April 22, 1850; but the enrolled bill shows that only the third chapter was repealed; *Brewster et al. v. Hartley et al.*, **1**-233.

8. **ACT NOT REPEALED.** Section 15 of the act of the legislature of the state of Indiana of May 20, 1852, for the incorporation of manufacturing and mining companies, was not repealed

by the supplemental act of March 4, 1863; *Traber et al. v. Brown et al.*, 1-366.

9. **STATUTE CONSTRUED.** Under the statutes of the state of California the legal existence of a corporation can not be assailed by a defendant to an action on a promissory note, in which the plaintiff is proved to be a *de facto* corporation, and claims, in good faith, to have a legal existence under the laws of the state; "*Pacific Bank v. De Roe*, 1-246.

10. —. The statute is not limited to corporations in existence at the time it took effect. *Id.*

11. —. A statute of Massachusetts, entitled "An act to enable the city of Boston to abate a nuisance therein, and for the preservation of the public health of the city," authorized this city to purchase or otherwise take certain lands with the buildings and fixtures thereon, and prescribing a method of ascertaining their value and the payment thereof, to the owners. It was held that the city, by a compliance with the provisions of the act, acquired a title in fee simple; *Dingley v. City of Boston*, 2-503.

12. —. It was provided in an act of the legislature, that towns, authorized to issue bonds in payment for railroad stock for which they were empowered to subscribe, might subscribe if a majority of the votes cast "at any annual election or at any special election called for that purpose," be given in favor of issuing such bonds. The question was presented to the voters of the town at a "town meeting." Held, that inasmuch as a town meeting is an election, within the general meaning of that word, and the evident intention of the legislature was to have a full expression of the voters' opinion, which experience shows is best obtained at such town meeting, the statute was complied with; *Phillips et al. v. Town of Albany et al.*, 4-220.

13. —. If by an act of the legislature, it is required that notices be posted by an officer named, it is not contemplated or required that that officer shall post such notices with his own hands, or by himself in person. *Id.*

14. —. A statute of Minnesota, of February 28, 1866 (*Gen. Stats.*, 1866, 494), provided that mesne process might be served upon a foreign corporation by delivering a copy thereof to the president, secretary, or any managing or general agent thereof and this act should have "full force and effect, notwithstanding any provisions of the general statutes [chapter 66, approved March 1, 1866,] or other law of the state, inconsistent therewith," and the act was directed to "be published with and as a part of the general statutes." A majority of the court, *WILSON*, ch. j., dissenting, construed this act to mean that delivery of a copy of summons to a general, or managing, agent of a foreign corporation is a sufficient service, notwithstanding the provisions of general statutes (*p.* 456), section 48, which, providing for service of original process

on domestic corporations, enacts "such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein," and section 56, which declared "no corporation is subject to the jurisdiction of a court of this state unless it appears in the court, or has been created by or under the laws of this state, or has an agency established therein for the transaction of some of its business, or has property therein upon which the plaintiff has acquired a lien, by attachment or garnishment, and in the last case only to the extent of such property at the time of the jurisdiction attached;" *Guernsey v. American Ins. Co.*, **3-490**.

15. **STATUTE CONSTRUED.** The statute of Kentucky imposing "on bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock owned therein, by individuals, corporations or societies," provides for a tax upon the shares owned by individuals and not upon the capital of the bank; *National Bk. v. Commonwealth etc.*, **3-12**.

16. —. A stamp such as the internal revenue act requires, for the acceptance of a draft, is not required on making a check "good," "certified" checks being taxed specifically another way; *Merchants Nat. Bk. v. State Nat. Bk.*, **3-25**.

See particular titles.

STATUTE OF FRAUDS.

1. **PAROL PROMISE TO CONVEY LAND.** Where the owner of a lot of ground agreed to convey the same when a building should be erected thereon and dedicated to public worship and the society incorporated, and a subscription was raised and building erected, held, that such expenditure by the society was tantamount to the payment of a consideration, and took the promise out of the statute of frauds; *Whitsitt v. Trustees etc.*, **10-223**.

2. **CONTRACT FOR SALE OF STOCK.** A contract for the sale of shares of stock in a corporation is a contract for the sale of goods, wares, or merchandise, within the statute of frauds. The fact that the plaintiff, in an action for the refusal to take the shares, in pursuance of an oral agreement to that effect, has been induced to become a stockholder by the defendant's promise to buy the stock of plaintiff when he wished to sell, is immaterial; *Boardman v. Cutter*, **7-509**.

3. **TRANSFER OF PROPERTY.** Where a corporate debtor transfers his property to another who, in consideration thereof, promises to pay the debts of the former, the promise is not within the statute of frauds; *Sullivan et al. v. Murphy et al.*, **7-606**.

STATUTE OF LIMITATIONS.

1. **PERSONAL LIABILITY.** It is provided, by statute, that actions against directors or stockholders of a corporation, to recover a

penalty or forfeiture imposed or to enforce a liability created by law must be brought within three years after the discovery by the aggrieved party of the facts, etc. An action against stockholders to recover money had and received less than three years before action commenced is within the statute and in apt time; *Green v. Beckman et al.*, 9-24.

2. **PERSONAL LIABILITY.** A statute which declares stockholders liable individually for the debts of the corporation, contracted while they are stockholders, and provides that the creditor, prosecuting the company for the recovery of the same, may include one or more of the stockholders liable to contribute to its payment, but that, in case of a recovery against the company and the stockholders, no execution shall be levied on the property of the stockholders except for such deficiency as may remain unsatisfied after the property of the company has been levied and applied on the judgment, so operates that whenever a cause of action accrues against the corporation it, also, accrues against the stockholders; wherefore, as to the stockholders, as well as the company, the statute of limitations then commences to run; *Conklin v. Furman et al.*, 4-568.

3. **AS TO SUBSCRIPTION FOR STOCK.** The statute of limitations does not run as to unpaid balances on stock subscriptions for stock, while the company is in active operation, from the time of the subscription of the stockholders until the commencement of the suit for calls made; *Harmon v. Page et al.*, 9-29.

4. **PLEADING.** A defendant can not avail himself of the statute of limitations by demurrer to the complaint, unless it affirmatively appears, therefrom, that the action is barred by some provision of that statute. *Id.*

5. **DISCOVERY OF FRAUD.** That an innocent party may not suffer while in ignorance of his rights, the statute excepts the plaintiffs from the limitation until a discovery of the fraud; but, knowledge on the part of the guilty officers and agents of a corporation of the fraudulent acts and conduct of themselves and guilty associates is no notice to the corporation, or its stockholders, so as to give the advantage of such notice to such agents and associates; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

6. **WHEN NOT SUSPENDED.** The mere fact that the mayor, to whom, in conjunction with a common council, is given the general management of the affairs of a city, is interested adversely in a cause of action belonging to it, and a necessary party defendant in an action to enforce such cause of action, does not operate to suspend the running of the statute of limitations; *City of Fort Scott v. Schulenberg et al.*, 7-156.

7. —. Certificates of stock have been issued without the seal of the corporation and by legislative authority, containing a stipulation to pay interest thereon; it was held, in an action to re-

cover the interest, that the statute of limitations did not apply; *Pittsburg & Con. R.R. Co. v. Co. of Allegheny*, 4-92.

8. **MINING COMPANY; CALIFORNIA.** The statute, of California, provides that "each stockholder in a mining corporation shall be liable for his proportion of all the debts and liabilities, of the company, contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted." The right of action against the stockholder is not contingent on a recovery against the corporation; but, accrues at the same time against both, stockholder and corporation; *Davidson v. Rankin et al.*, 1-199.

9. **STATUTE OF NEBRASKA.** The code of Nebraska bars actions upon contract in five years, not computing the space of defendant's absence from the state. In the case of a foreign corporation, if it has a managing agent in the state, service of process may be made upon such agent. Held, that the statute began to run from the date of the presence of such managing agent in the state; that is there must be the opportunity during five years before suit brought, for plaintiff to have sued defendant in the state and compelled it to answer, by service upon a managing agent; *Express Co. v. Ware*, 5-72.

10. **STATUTE OF NEW YORK.** The courts of New York have decided that a foreign corporation can not avail itself of the statute of limitations of that state. This, notwithstanding the defendant was the lessee of a railroad in and had property within the state, as well as a managing agent residing and keeping an office within the state; *Tioga R.R. Co. v. Blossburg & Corning R.R.*, 4-265.

11. **AS TO REALTY.** Statutes of limitations, as to real estate, operate against corporations, as well as natural persons, and, even, against the state; wherefore, although the alienation of the realty of a religious corporation may be contrary to public policy, yet such a corporation may lose its title by adverse possession. Mere incapacity to convey is not one of the excepted disabilities preventing the operation of the statute of limitations; *Reformed Church v. Schoolcraft et al.*, 5-581.

See **LIMITATIONS; STOCK AND STOCKHOLDERS** (69, 179-182).

STOCK AND STOCKHOLDERS.

1. **CAPITAL STOCK.** The capital stock of a corporation is the money and property put in to the single corporation fund, by the subscribers for such stock, which fund becomes the property of the corporation; *Burrall v. Bushwick R. R. Co.*, 8-554.

2. —. The capital stock of a company consists of the corporeal works and property, with the franchises to be used by the corporation for the profit of the corporation and its stockholders, with the right to acquire and dispose of such property as may be

essential in the legitimate exercise of its functions; *Black et al. v. Delaware & Raritan Canal Co. et al.*, 5-547.

3. CAPITAL STOCK. The capital stock of a corporation, within the meaning of the statute, embraces the capital on which it transacts business, whether it consists of money, property or other valuable commodities; *Martin v. Zellerbach*, 1-170.

4. PROFITS. Capital stock does not include profits realized, by the corporation, from its business; *Reid et al. v. Eatonton Manuf. Co.*, 3-219.

5. STOCKHOLDERS ARE THE COMPANY. The shareholders constitute the company, where there is stock; not the directors; *Simons et al. v. Vulcan Oil & Mining Co.*, 6-80.

6. PRESUMPTION. It is a presumption of law, that a company about to be formed, has no shares of stock to sell; *California Sugar Manuf. Co. v. Shafer*, 4-271.

7. —. Every stockholder is presumed to know the provisions of the charter, and the general law and statutes relating to corporations; *Crandall v. Allen*, 10-102.

8. A TRUST FUND. The capital stock of a corporation is regarded in equity as a trust fund for the payment of its debts, and courts will prevent its withdrawal beyond the reach of creditors. *Id.*

9. —. The capital stock of a corporation is a trust fund, that the directors may not give away, or mis-appropriate, to the prejudice of parties whom they have invited to deal with the incorporation. The state grants the franchise on the understanding the corporation created will have a capital stock; and the amount is usually fixed before the state parts with the franchise. It is for the security of all persons who deal with the corporation as well as to afford the means to accomplish the objects of the incorporation; *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co. et al.*, 6-481.

10. —. The capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation; *Sawyer v. Hoag*, 5-25.

11. —. Unpaid subscriptions to the capital stock of a corporation constitute a trust fund, to be held by the corporation for the benefit of creditors and shareholders. Directors have no power to release a subscriber to the prejudice of creditors or to the injury of other stockholders; *Rider v. Morrison et al., rec'rs etc.*, 7-415.

12. STATUS OF THE CAPITAL. The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees, and it is to be managed for the benefit of the shareholders during the life time of the company and for the benefit of creditors in the event of its dissolution. It includes the amount promised to be paid as well as the sum paid in, and the directors, or managers, are under

obligation to call in what is unpaid and carefully to husband it when the money is received; *Upton, assignee, v. Tribilcock*, 5-111.

13. STATUS OF THE CAPITAL; TRUST FUND. Subscriptions to the capital stock of a corporation constitute a trust fund for the payments of the debts of the corporation. The trust is created for the benefit of creditors as a class. All the creditors of the corporation have a common interest in the fund and are entitled to share it ratably; *Wetherbee v. Baker et al.*, 9-547.

14. —. As a general rule, the property of a corporation is a trust fund for the benefit of its creditors and stockholders, and they may, in all cases in which it has been fraudulently or wrongfully disposed of by the directors, pursue it in to the hands of purchasers with notice, and assert their lien upon it or their claims for its value; *Goodin v. Cincinnati & Whitewater Canal Co.*, 3-652.

15. —. The capital stock of a corporation is a trust fund for the payment of the debts of the corporation, upon the faith of which, alone, the law presumes credit to be given, unless other security was taken at the time by the creditor; *Reid et al. v. Eatonton Manuf. Co.*, 3-219.

16. CREDITORS' EQUITABLE LIEN. The capital stock of an incorporated company is a fund set apart for the payment of its debts, and its creditors have a lien in equity. If diverted, they may follow it so far as it can be traced, and subject it to their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice; *Clapp et al., exec'rs, v. Peterson*, 9-172.

17. CORPORATION IS TRUSTEE. A corporation is the custodian and trustee of the corporate funds, stock, etc. for the stockholders. If it employ an agent to transfer stock, it is responsible for the acts of such agent and liable for his negligence or fraud; *Woodhouse v. Crescent Mut. Ins. Co.*, 10-472.

18. SHAREHOLDERS PRIVIES TO THE TRUST. The shareholders of a corporation are conclusively charged with notice of the trust character which attaches to the capital stock. As to it, they can not occupy the status of innocent purchasers, but they are, to all intents and purposes, privies to the trust. When, therefore, they have in their hands any of this trust fund, they hold it cum onere—subject to all the equities which attach to it; *Clapp et al., exec'rs, v. Peterson*, 9-172.

19. BONA FIDE PURCHASER. The capital stock of a corporation is a trust fund for the payment of its debts; but, where shares of the capital stock are issued, by the corporation to the original subscribers, as full paid shares and are sold by them as such, one who purchases in good faith, can not be held liable to a creditor of the corporation; *Brant v. Ehlen et al.*, 9-394.

20. **BONA FIDE PURCHASER.** The unpaid subscriptions of an insolvent corporation constitute a trust fund to this extent; if the corporation ceases to do business, or if it becomes insolvent, then all assets which it then has, or owns, including paid and unpaid subscriptions, either in the hands of the original subscriber or in the hands of his assignee without notice, become a trust fund for the payment of creditors and they may follow the property constituting the fund and subject it to the payment of their debts, unless it has passed in to the hands of a bona fide purchaser without notice. *Id.*

21. —. As between the creditor of the corporation and the original holders of stock, it in no manner affects the rights of the former that the stock has been issued as fully paid up stock. The rights of the creditor do not depend upon the mere appearance of things, but upon the actual bona fide payment by the stockholders, whether that payment be alleged to have been made in money or other property; *Crawford et al. v. Rohrer et al.*, 9-407.

22. **SHARE DEFINED.** A share of the capital stock of a corporation is the right to partake, according to the amount put in the corporate fund, of the surplus profits and, upon dissolution of the corporation, of the fund remaining after the payment of debts; *Burrall v. R.R. Co.*, 8-554.

23. **SHARES ARE PERSONALTY.** Shares of stock in incorporated companies, whether the property of such companies be tangible or intangible, are personal property; *Seward v. City of Rising Sun et al.*, 7-111.

24. **HOW ISSUED.** Under the statute in Massachusetts, special stock may be issued by a corporation, and when issued, the holders of it are not liable for debts of the corporation beyond the amount of their stock. Such stock can only be issued by a vote of three-fourths of the general stockholders, at a meeting duly called for that purpose; *American Tube Works v. Boston Machine Co.*, 10-588.

25. **ISSUED OUT OF STATE.** Certificates of stock are not necessarily invalid because issued at some place outside the state under the laws of which the company is incorporated and where it has its principal place of business; *Courtright v. Deeds*, 5-366.

26. **ISSUE TO OFFICERS.** Where the by-laws of a corporation, lawfully adopted, authorize and require its certificates of stock to be issued under the corporate seal and signed by its president and treasurer, in the absence of any express provision or exception, no other or different form of certificate is required in the case of stock owned by one of the officers named; but, they are authorized to issue certificates to themselves, in the same manner as to other stockholders; *Titus v. Great Western Turnpike Road*, 5-563.

27. **INSTANCE.** Where the treasurer of a corporation, upon the faith and pledge, as collateral, of spurious certificates, drawn up

and executed in the form and manner prescribed by the by-laws, purporting on their face to be of stock owned by the treasurer, obtained a loan of one, acting in good faith and in ignorance of the fraud, it was held, that there was no thing, upon the face of the certificates, to notify the lender of any defect in the title, and the corporation was liable. *Id.*

28. PROPORTION TO INCORPORATOR. An original incorporator is not, as such, independent of a contract with the directors of the company, entitled under the charter or the common law, to a proportion of the stock, to be determined by the number of original incorporators named in the articles of incorporation; *Brown v. Florida South. Ry. Co.*, 10-131.

29. —. A grant of land by the state to a corporation having power to make contracts for the purpose of accomplishing corporate purposes, is not a grant to the original incorporators signing the articles of incorporation, in the proportion for which they have subscribed for stock, nor does it authorize a division of the land to the original incorporators. *Id.*

30. —. Stock is originally acquired by a subscription therefor. This subscription is a contract defined and regulated by the organic law of the corporation. A stockholder can acquire stock only by purchase or subscription therefor, by which he contracts to pay calls and assumes the other liabilities to creditors and the corporation which such relation imposes. He is not entitled to stock as a mere gratuity. *Id.*

31. FRAUDULENT ISSUE. A corporation, by its charter, was authorized to issue one million dollars of stock, in payment of real and personal property. By vote of its directors, it issued stock to the extent of one million dollars, which was distributed to five of its officers. No money or property was transferred and no promise to pay for such stock was made. The stock had no validity and its issue was a fraud and palpable violation of law; *Tobey v. Robinson*, 6-505.

32. FRAUD IN ACCEPTANCE OF, AND ISSUE. It is gross fraud, on the part of a corporation, to issue paid up certificates of stock, in consideration of property at a valuation or price known and understood to be many times its value. The fraud is greatly intensified when, in such a transaction, the officers of the corporation are dealing with themselves as stockholders; *Moss v. King*, 6-514.

33. EQUITY NOT AID TO RECOVER FRAUDULENT SHARES. A corporation was organized, under charter, with authority to issue stock in payment for real and personal property. The only property it received was from another company, which was secured, as to re-payment, by such security as a mortgage on the property conveyed afforded and the possession of the control of the new organization. The directors voted the issue of all the stock it was authorized to issue, to be used as a corruption fund,

and four hundred thousand dollars, of the whole amount of one million, were donateded by the directors to themselves, they paying nothing therefor, nor agreeing to pay any thing. The issue of stock was fraudulent, and if the stock issued had any validity it was good only in the hands of the corporation which had furnished the property, real and personal, which the company issuing the stock was in possession of; wherefore, when upon a controversy as to the ownership of the stock, or to recover the proceeds of a share in the division, a bill in equity was filed, it was properly dismissed out of court; *Tobey v. Robinson*, 6-505.

34. WHO IS A STOCKHOLDER. One who was an original corporator and signer of articles of incorporation; who subscribed for shares of stock which, however, he did not pay for; who was a trustee of the corporation and acted as such, the ownership of stock being a matter of qualification for the office; who was an officer of the company and actively engaged in the management of its affairs; and, who appeared upon the stock book of the company as a stockholder is a stockholder and liable to respond to creditors under a statute imposing a personal liability, notwithstanding a certificate of the ownership of shares has not been issued to or received by him; *Wheeler v. Millar*, 9-647.

35. WHAT CONSTITUTES A STOCKHOLDER. The holder of shares of stock, evidenced by certificate and transferred to him upon the books of the corporation and standing thereon in his name, having all the muniments of a perfect legal title, is a stockholder irrespective of the quality of his ownership; *State of Nevada, ex rel. Rankin, v. Leete*, 8-361.

36. RELATION OF STOCKHOLDER, HOW CREATED. The relation of stockholder of a corporation is created by the usual formalities of subscription and the acceptance of stock. It may, also, be created by other acts, which in the contemplation of law are the legal equivalent of such acts; that is to say, conduct, on the part of the person sought to be charged, is, of itself, sufficient to accomplish all which might be accomplished by the rigid observance of formalities, usually, required on becoming a stockholder; *Griswold v. Seligman*, 8-247.

37. OWNERSHIP. A subscriber may become the owner of a given number of shares, but not in such sense that he may take away those shares out of the corporate fund. The corporation has no power and can not be compelled, while continuing in lawful existence and carrying on the business for which it was created, to issue and deliver such shares. All the corporation can do is to issue written certificates of the existence and ownership of such shares, known as stock certificates; *Burrall v. Bushwick R.R. Co.*, 8-554.

38. —. A company had been organized, composed of individuals owning oil lands, by the name of the Ellenville Petroleum Company and all of its stock subscribed for. It was the in-

tention to incorporate on the basis of the property so held, but, before this was done, defendant, who was a subscriber to the stock, agreed with plaintiff if the latter would pay to the treasurer \$500 he would see that plaintiff had half a share of the stock. Plaintiff paid the money, which was credited to defendant. A corporation was afterward incorporated identical as to shareholders and property, but named the Ross Farm Petroleum Company. No stock was transferred to plaintiff and no demand therefor was made by him. The corporation becoming embarrassed, its property was, by direction of the directors, sold at auction and bid in by H., for the benefit of the stockholders. Defendant paid his proportion of the sum bid. In an action to recover the \$500, it was held that, to put defendant in default, a demand by plaintiff of the stock was requisite, or proof that it was out of defendant's power to transfer it; that defendant's contract would have been performed by a transfer of stock in the corporation succeeding to the property of the Ellenville Petroleum Company; and that a transfer by defendant to plaintiff of an interest in the property held by H. in trust, equal to the interest defendant contracted to convey, would have satisfied any equitable claim of plaintiff and have been a legal performance of the contract; *Weller v. Tuthill*, 8-461.

39. EFFECT OF OWNERSHIP. When one purchases stock in a corporation and becomes its owner, in whatever manner he may pay for the same, he becomes entitled to all the privileges and benefits of a stockholder and liable to all the burdens the relation imposes; *Chetlain, adm'r, v. Republican Life Ins. Co. et al.*, 6-397.

40. MEANING OF CERTIFICATE. A corporation by issuing stock declares to the world, by its certificate, that the person in whose name it stands, is the holder of the number of shares which the certificate states him to be, and that it is issued with the intention that it shall be so used and acted upon, and the company is liable to any one who has accepted the same and acted thereon to his injury; *Metropolitan Bank v. Mayor etc.*, 10-555.

41. —. It is only, however, to the extent that loss has actually been incurred by the holder, through the misrepresentation made by the certificate, that it will be held liable. *Id.*

42. —. The payment of a subscription entitles the payor to stock. The certificate is merely the evidence of ownership. It may be demanded and obtained, by the owner of stock, whenever he may desire; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

43. POSSESSION OF CERTIFICATE. The title to and ownership of stock in a national bank can pass only by a transfer of the stock on the books of the corporation; hence, a mere possession of a certificate of stock, in a national bank, is not such a possession as to constitute the holder a pledgee; but is, at most, a mere equity; *Koons v. First Nat. Bk. et al.*, 9-289.

44. POSSESSION OF CERTIFICATE. To constitute one a stockholder it is not necessary that he should have any certificate of stock; *Corwith et al. v. Culver*, 5-244.

45. —. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder; *Upton, assignee, v. Tribilcock*, 5-111.

46. EVIDENCE OF OWNERSHIP. As between the corporation and the corporators the stock book is the evidence of their relation; the certificate is secondary evidence; *Bk. of Commerce's Appeal*, 5-603.

47. LOST CERTIFICATE. The loss of one's certificate of the ownership of shares of stock and advertisement of the loss being established, the proper officers of the corporation can not refuse to issue a new certificate, on the ground that a bond of indemnity is not furnished. There is no good reason for requiring such a bond, the stock can not be transferred, by the owner, except upon the books of the company and on the production of the certificates. This is sufficient protection for the corporation; *State, ex rel. Phillips, v. New Orleans Gas Light Co.*, 5-404.

48. STOCKHOLDERS' CONTRACT. Every stockholder contracts, with each other stockholder and the corporation, that the will of the majority shall govern in all matters coming within the scope of the articles of incorporation; *Dudley v. Kentucky High School*, 5-382.

49. —. Each and every stockholder contracts that the will of the majority shall govern in all cases coming within the limits of the act of incorporation; and, in cases involving no breach of trust, but, only error or mistake of judgment upon the part of the directors, who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. *Id.*

50. RELATIONS TO COMPANY AND PUBLIC. The relations of a stockholder to the corporation and to the public, or strangers who deal with the company, are such as to require good faith and fair dealing, in every transaction of his with the corporation (of which he is a part owner and controller) which may injuriously affect the rights of creditors or the general public. Such transactions should be subject to rigid scrutiny and if it be found to be infected with any thing unfair toward such third person, calculated to injure him, or designed, intentionally and inequitably, to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect the latter; *Sawyer v. Hoag*, 5-25.

51. CONTRACT BETWEEN STOCKHOLDERS. Between themselves, stockholders of a corporation agree by their contract of subscription etc. that each shall own a proportionate share of the whole property of the company in common and in all its earnings and that the common property shall be so managed as to return a profit,

by its use for the purposes designated in its charter, and that what the majority determines, within the scope of this mutual contract, each shall abide by; *Black et al. v. Delaware etc. Canal Co. et al.*, 5-547.

52. **LIMIT OF POWER OF A MAJORITY.** A majority of stockholders, however large, has no right to divert one cent of the joint capital to any purpose not consistent with and growing out of the original fundamental joint intention. *Id.*

53. **STOCKHOLDER'S INTEREST.** The stockholders own the property of the corporation in common, to be employed in specified uses. Each owns a share in the whole and is to have a proportionate share in its profits. Each has invested his capital in it and in it alone, and each has an interest in the whole property and in every dollar it earns. The directors are their trustees, to employ the joint capital in the management of the property, and that only, to the end that from the investment the stockholders may reap the contemplated profits. *Id.*

54. **HOLDER OF STOCK NOT A CORPORATOR.** Where a person is merely in possession of the stock of a corporation — in this case, a national bank — as collateral security, for the payment of a debt, and does not participate in the meetings of the stockholders and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound by the knowledge of the facts in possession of the officers of such corporation: *Baker et al. v. Woolston*, 9-321.

55. **STATE AS STOCKHOLDER.** A state being a stockholder in a private corporation, like another stockholder, has the right to dispose of its interest, if it chooses so to do. Such sale does not dissolve a corporation; *LaGrange & Memphis R.R. Co. v. Rainey et al.*, 4-175.

56. **AS JURORS.** It is not a valid objection to one offering as a juror, that he is a stockholder or director of a kindred corporation, in a case involving a question of interest to a corporation; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

57. **RELATION TO CREDITORS.** Stockholders of a corporation can have no priority over the creditors; *Good v. Sherman et al.*, trustees, 4-197.

58. —. Stockholders of a corporation are not, as regards the creditors of the corporation, sureties but principal debtors; *Sonoma Valley Bank v. Hill*, 9-24.

59. **PRIORITY OF CREDITORS.** The claims of stockholders in a corporation are subordinate to the claims of creditors and the stockholders are not entitled to any division of the profits and moneys until all its debts are paid; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

60. **SHARE NOT NEGOTIABLE.** It is now well settled that a certificate of stock is not a credit or evidence of debt. It is merely evidence of ownership of a certain interest in the assets and

property of a corporation; *Factors & Traders Ins. Co. v. Marine Dry Dock & Ship Yard Co.*, 7-236.

61. SHARE NOT NEGOTIABLE. A certificate of stock in a corporation which expresses upon its face that it is "transferable only on the books of the company by the holder thereof in person, or by a conveyance in writing, recorded on said books and surrender of this certificate," and upon which is indorsed a blank transfer, is not a negotiable instrument; *Shaw v. Spencer et al.*, 1-625.

62. —. Certificates of stock in a corporation are not negotiable securities, in a commercial sense. They are mere muniments and evidences of the holder's title to a given share in the property and franchises of the corporation; *Sherwood v. Meadow Valley Mining Co.*, 6-223.

63. ISSUED IN VIOLATION OF LAW. Corporate stock issued in contravention of the act of incorporation is illegal and void. Being void the company can not be required to transfer the same upon its books, notwithstanding the consent of all the parties, in interest as stockholders, at the time of its issue; *People of Illinois, ex rel. Wallace, v. Sterling Burial Case Manuf. Co.*, 6-376.

64. ESTOPPEL TO DENY CERTIFICATE. If a corporation, having power to issue stock certificates, does, in fact, issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares, it thereby holds out, to persons who may deal in good faith with the person named in the certificate, that he is an owner and has capacity to transfer the shares. This proposition rests on general principles, appertaining to the law of estoppel; *Holbrook v. New Jersey Zinc Co.*, 4-637.

65. ESTOPPEL, AS TO ORGANIZATION. The legality of the organization of a corporation can not be questioned by a stockholder, that he may escape from liability upon his stock note, as by showing that the corporation was not organized in strict conformity to law; per example, by showing that instead of the cash payment required by law to be made, by all subscribers of stock, the corporation had accepted notes secured by mortgage on real estate; *Home Stock Ins. Co. v. Sherwood*, 8-268.

66. ESTOPPEL. One who accepts and holds certificates for unpaid shares of stock in a corporation, and votes such shares at annual elections, is estopped from denying his liability as a stockholder to the corporation or its creditors; although such shares were issued to him under an agreement in writing that they were to be held in trust or as a security only, and were not subscribed for on the books of the company, or otherwise, in the usual manner of making such subscriptions; *Griswold v. Seligman*, 8-247.

67. —. A stockholder in a corporation will not be allowed to deny the validity of stock issued by the corporation in consideration of the acquisition of property, so long as the corporation

retains the property; *Buford v. Keokuk Northern Line Packet Co.*, 8-226.

68. **ESTOPPEL.** A stockholder who has participated or acquiesced in the action of corporate officers in laying an assessment is estopped, and can not afterward sustain the objection that the assessment was laid without due authority; *Ossipee Hosiery & Woolen Manuf. Co. v. Canney*, 5-532.

69. **STATUTE OF LIMITATIONS.** Certificate of stock, having been issued under the seal of the corporation and by legislative authority, containing a stipulation to pay interest thereupon; it was held, in an action to recover the interest, that the statute of limitations did not apply; *Pittsb. & Conn. R.R. Co. v. County of Allegheny*, 4-92.

70. **PREFERRED STOCK — DISTINGUISHED.** Preferred stock as usually understood is some thing quite different from such special stock. Authority to issue preferred stock is not conferred in express terms by any general statutes; *American Tube Works v. Boston Machine Co.*, 10-588.

71. **INSTANCE.** A corporation at a meeting not duly called, voted to issue special stock, and stock was issued to plaintiff for a debt due it. Afterward at a meeting duly called, but at which it does not appear three-fourths of the general stockholders voted, it was voted to issue special stock, and such stock was issued and taken by plaintiff in lieu of the first stock issued. Plaintiff received dividends on the same for some time. The company became insolvent, and plaintiff offered to surrender such stock and return the dividends received and proved its debt against the estate of the corporation in insolvency; Held, (1) that the issue of such special stock was void, and being open to repudiation by the corporation or any dissenting stockholder, the plaintiff had an election to rescind the contract, and be restored to its original position; (2) that plaintiff was not estopped by the receipt of dividends from making such rescission; (3) that notwithstanding plaintiff had held such stock and received dividends thereon for some years, the election to rescind was made in a reasonable time; (4) the offer of the plaintiff to restore the dividends received was sufficient. Under the circumstances, the dividends received, not being equal to the amount of plaintiff's debt, no offer to return was necessary. *Id.*

72. **PREFERRED.** Upon the purchase of the stock of a corporation and the issue, to the purchaser, of a certificate therefor, he acquires a vested right. Any action of the corporation which divides the shares of its stock sold and in the hands of lawful owners into classes and gives to one class a preference over the other in sharing in the earnings of the corporation materially and injuriously affects the rights of the owners of the latter class and, if without their assent or acquiescence, is illegal; *Kent v. Quick-silver Mining Co. et al.*, 8-613.

73. **PREFERRED.** The issue of preferred stock with the privilege annexed, that stockholders may subscribe for and take it upon the payment of a stipulated sum per share, can not be considered as an executory contract. *Id.*

74. —. Nor can such transaction be considered as a borrowing by the corporation; it is a preferring of one class of stockholders to another. *Id.*

75. —. There is no power in a corporation, or in the majority of its stockholders, to provide for the creation of a preferred stock, so as to bind the minority of the stockholders not assenting thereto or acquiescing therein. *Id.*

76. —. A holder of common stock has an equitable right to restrain a privileged payment to a preferred stockholder, from the profits of the company and to have the contract therefor declared illegal. It is, however, his duty to be prompt in his application for relief, before innocent third persons can be injured. *Id.*

77. **INSTANCE.** The Quicksilver Mining Company, a corporation, by its charter (Laws, N. Y., 1866, ch. 470), was authorized to issue certificates of stock, representing the value of its property, in such form and subject to such regulations as it might, from time to time, by its by-laws prescribe. A by-law was adopted declaring the whole value of its property and the whole amount of its capital stock, which was divided into equal shares, and directing the issuing of certificates of stock therefor, which was done. Subsequently, at an annual meeting of the stockholders by a vote of stockholders owning a majority of the capital stock, it was resolved, and by-laws were adopted to the effect, that holders of the company's stock who would surrender their certificates and pay five dollars on each share should be entitled to the same number of shares of preferred stock, which should be entitled to interest at seven per cent. per annum, to be paid out of the net profits of the company, any surplus of earnings, after payment of such interest, to be divided pro rata among the holders of preferred and common stock. The preferred stock was at once, after said meeting, offered for subscription to all the stockholders, and a circular informing them thereof was issued and distributed to them. A large number subscribed and paid the sum prescribed, which money went into the assets and business of the company. Certificates for the old stock were surrendered and certificates for the preferred stock were issued to such subscribers; and it, as well as the common stock, was dealt in and sold openly at the stock exchange, the former for the higher price. They were quoted in the daily public prints and for four years the two kinds of stock were spoken of in the annual reports of the directors. During this time there was no action of the company, or of any individual stockholder, to have a judicial declaration that the creation of the

preferred stock was unauthorized. In actions afterward brought by holders of the common stock, for that purpose, it was held that such holders were chargeable with notice of the issuing of the preferred stock and that by acquiescence during so long a space of time, they had ratified and assented thereto, and the same was binding on them, at least as against such holders of the preferred stock as had purchased after it had been placed on the market and dealt with as a valid and recognized issue, and that as, in the particular suit, the prayer for relief was, in effect, that all the preferred stock should be called in and cancelled and it was not practicable to adjudge that a portion of the shares of the preferred stock should be called in and cancelled, or equalized with the common stock, without all being so treated, there was no cause of action. *Id.*

78. **PREFERRED STOCK; DIVIDEND.** Where a corporation adopted a by-law that its net earnings should be divided semi-annually among its stockholders, first paying upon the preferred stock six per cent., and then, if a surplus, as much upon the non preferred stock, dividing the surplus, if any, among all stockholders alike, held, that subscribers for preferred stock took their shares upon the conditions named in the by-laws as a contract between themselves and the corporation; *Belfast etc. R.R. Co. v. City of Belfast*, 10-534.

79. —. A preferred stockholder is not a creditor, nor is a dividend guaranteed to him; he is entitled thereto by the by-laws provided there are net earnings. *Id.*

80. —. A corporation was authorized, by statute, to issue preferred stock, giving its guaranty that such stock should receive a semi-annual dividend of a stated amount. The corporation for the most part of the time after its organization did an unprofitable business, and finally became insolvent. Upon a bill by the assignee in insolvency to compel the holders of such preferred stock to refund dividends paid to them when there had no profits accrued to the corporation, from which dividends could rightfully be paid, held, that the guaranty of dividends was an absolute one, and not conditioned upon the earnings of profits by the corporation; *Williams v. Parker*, 10-566.

81. **CORPORATE SALE OF SHARES.** The employment of a broker to sell stock at the board of brokers is within an authority conferred by a resolution directing the president of the company to sell the same for the best interest of the company, without further delay, the board of brokers being a recognized market for the sale of stocks at the habitat of the corporation. The direction is in the nature of an injunction, but it leaves a discretion in the officer to determine how the corporate rights shall be protected, and the corporation as the owner of the stock may sell it, as any other owner of similar property may, and may employ a broker to that end. In the case, however, of a savings bank, there can be no

doubt that speculative contracts for the sale of stock, by the bank, subject to the hazard of contingencies of gain or loss, would be ultra vires; *Sistare v. Best*, rec'r, 9-626.

82. CORPORATE SALE OF SHARES. A sale of stock in a company at its par value, the consideration to be paid out of the net receipts of earnings of the stock received quarterly by the company, and a note given therefor, with the condition that the principal should become due if the instalments were not regularly paid; held, a valid sale under the circumstances. Such a condition in the note is not a penalty, but it is of the substance of the contract; *Dean v. Nelson and May*, 1-66.

83. SALE BY CORPORATION ON OPTION. An optional sale by a corporation — in this case a savings bank — of stock owned by it is not an act beyond the general scope of its corporate powers, and, if the corporation, as between the agent empowered to sell and itself, was the owner of the stock which the plaintiff was employed to sell, and his employment to make the sale was an employment by the corporation, a private sale of the stock subsequently, without notice to the plaintiff's agent, or revocation of his authority, by which the corporation became disabled from furnishing the stock to meet the contract of sale made by the plaintiff, is no defense to an action to recover the amount of a difference of price such agent had to pay at the expiration of the option for a failure to deliver the shares; *Sistare v. Best*, rec'r, etc., 9-8.

84. SALE ON OPTION. An agreement, for a valuable consideration, by A. to purchase from or sell to B., at the option of the latter at a specified price, is not per se a gaming contract. An illegal intent will not be presumed and, in the absence of proof that the parties were merely speculating upon the fluctuations in the price of the stock, without any intent that A. should deliver or accept, but simply should pay differences, the contract is valid and may be enforced; *Story v. Salomon*, 8-505.

85. EXECUTORY SALE; GAMBLING CONTRACTS. Short sales, as they are called, when made by persons who do not own the stock sold, are mere speculations in the chances and fluctuations of the market. A sale upon "seller's option" when the seller owns the stock contracted to be sold, has no feature of hazard, or chance, except the ordinary risk incurred in all executory sales, that the purchaser may not complete his contract; *Sistare v. Best*, rec'r, 9-626.

86. REPRESENTATION AS TO CONDITIONS. A person buying stock from a corporation — in this case a bank — is entitled to rely upon assurances of an officer of the corporation as to its financial condition. If he be already a stockholder he is not bound to avail himself of the right to examine the corporate books; *Union Nat. Bank v. Hunt*, 9-528.

87. —. A representation by an officer of a corporation — in this case a banking corporation — that the stock of his company

is worth \$100 per share is a mere expression of opinion, or commendation of the stock. If it turns out to be false a note taken, by him, for the price of the stock will not, thereby, be avoided, nevertheless it was relied on by his purchaser. It is otherwise with a representation that the corporation is in a solvent condition and doing a good business. *Id.*

88. REFUSAL TO DELIVER CERTIFICATE TO EQUITABLE OWNER. A. was the equitable owner of certain shares of the capital stock of a railroad corporation. Certificates for this stock were outstanding in the name and possession of another party claiming title. The defendant railroad corporation refused to acknowledge A. as a member or stockholder. A. demanded of the corporation to transfer and deliver to him the shares of which he was the equitable owner. The defendant refused to comply with the demand. Held, this does not make a case for judgment against the corporation for the value of the stock. The remedy lies in another direction; *Nat. Bank v. Lake Shore & M. S. Ry. Co.*, 4-13.

89. SELLING STOCK TO COMPANY. As a rule, a stockholder who conveys his stock to the corporation, and receives in return a portion of its capital, holds the moneys so received, subject to the superior equities of creditors; *Crandall v. Allen*, 10-102.

90. —. The liability of a stockholder in such cases is not dependent upon the existence of a conspiracy to defraud, or of any fraudulent intent on his part. *Id.*

91. —; INSTANCE. Where a corporation whose capital was impaired, was buying in its own stock through an agent, who did not disclose the party for whom he was buying, but the sales were in fact made to the corporation, held, that this arrangement did not protect the sellers, since they had in fact received money from the capital of the corporation, and were not only bound to make inquiry, but were chargeable with the knowledge of the agent, who became their agent for the purpose of sale; and especially would it not protect stockholders who were trustees of the corporation and members of the executive committee. *Id.*

92. VOID CONTRACT AS TO. A contract, by which a shareholder in a corporation, in consideration of the purchase of a part of his stock, at a price named, agrees to secure to the purchaser the office of treasurer of the corporation, with a fixed salary, and in case of his removal to re-purchase the stock at par, is void as against public policy and as a fraud on the other members of the corporation, in the absence of evidence that the transaction was not for the private benefit of the shareholder, or that it was consented to by the other members of the corporation; *Guernsey v. Cook*, 7-466.

93. SUIT FOR PAYMENT. An original subscriber to the capital stock of a corporation is bound to pay for the stock as shall be required by regular assessments. When there are no assessments,

an action will not lie against him for any part of the sum due for such stock; *Halsey Fire Engine Co. v. Donovan*, **10**-652.

94. EVIDENCE THAT AMOUNT IS SUBSCRIBED. The articles of association, of a corporation, certified by the secretary of state, afford prima facie evidence that the full amount of capital stock, required by such articles to be subscribed before the company shall become a legally organized body, has been subscribed, and, in the absence of evidence tending in a contrary direction, such evidence will be conclusive: *Jewell et al. v. Rock River Paver Co. et al.*, **9**-71.

95. PAYMENT FOR. Under the California statutes, railroads can not issue certificates of stock until they are paid for in full; *Brewster v. Hartley*, **1**-233.

96. —. A corporation may receive, in payment of shares of its capital stock, any property which it may lawfully purchase and so long as the transaction stands unimpeached for fraud courts will treat as a payment that which the parties themselves have regarded as such. This, too, although the rights of creditors are involved; *Brant v. Ehlen et al.*, **9**-394.

97. —. As between the company and its stockholders the corporation may take payment in any thing it sees fit; but, as between the company and creditors it must so deal as to receive value, so that the amount of its capital stock shall be, in good faith, paid in or subject to lawful call to meet liabilities incurred upon the faith of the stock; *Moss v. King*, **6**-514.

98. STOCK NOTES. Notes, secured by mortgage on real estate, being accepted by a corporation in payment for shares of its capital stock, subscribed for, constitute, as between the subscriber and the company, a good consideration for the stock issued; *Protection Life Ins. Co. v. Osgood*, **6**-439.

99. FRAUD, IN PAYING FOR, BY SECURITIES. That securities given by a party, to a corporation, in payment for subscription to stock prove valueless, does not constitute such fraud as to invalidate the certificates of stock issued and delivered, when it does not appear that the party knew the securities to be valueless, represented them to be good, or resorted to any means whatever, to mislead, deceive or defraud the company, or to prevent it from inquiring into the facts. *Id.*

100. RIGHTS OF CREDITORS. Neither the stockholders, nor their agents—the directors—can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company, wherefore no contract can be made which will limit the liability of a subscriber, or his assignee, to pay the par value of his stock; *Webster v. Upton*, assignee, **5**-120.

101. ISSUE FOR LESS THAN PAR. The directors of a corporation have no power to issue stock for less than its par value, or with an understanding that the unpaid balance shall not be called for. This is a fraud upon the other stockholders and creditors.

and the person so securing stock will be liable for the unpaid balance to any creditor of the corporation; *Jackson v. Trauer et al.*, 10-393.

102. **ISSUE FOR LESS THAN PAR.** It is not necessary to the liability of a holder of stock so issued, that he should have subscribed for the same. His acceptance of the stock, with knowledge of the facts, determines his liability. *Id.*

103. **SALE BELOW PAR.** It seems that the officers of a corporation can not properly sell corporate stock at less than par; *Oliphant v. Woodburn Coal Co.*, 10-374.

104. —. A sale of special stock at its then market value, although below par, is not within the prohibition of the constitution; *Stein v. Trustees of Spring Valley Water Works*, 10-64.

105. **FALSE ISSUE OF, AS PAID UP.** The issue by a corporation of stock as paid up, when in fact only a pro rata portion has been paid in, may be ground for a proceeding by the state to wind up the concern, but is not ground for a stockholder, and a party to the illegal issue, to have his contract of subscription set aside, and his pro rata payment refunded; *Goff v. Hawkeye Pump Co.*, 10-370.

106. **LIMITING LIABILITY ON.** It is not within the power of directors to limit the liability of stockholders as to unpaid stock and any such transaction attempted is void; *Gill v. Balis*, 8-257.

107. —. When the charter has fixed the minimum amount of capital stock, the stockholders can not, by their private agreement, abrogate that provision of the charter; any device, by which the members of a corporation seek to avoid the liability which the law imposes on them is void, as to creditors, whether binding or not between themselves. Wherefore an agreement among stockholders that the shares of the capital stock of the corporation shall be regarded as fully paid up is void. It is not in the power of the stockholders to make the shares of stock issued to them non assessable, so as to excuse payment, for such stock, at its par value; *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co. et al.*, 6-481.

108. —. A private corporation organized under a special charter, which did not make the stockholders liable for the debts of the corporation. Its capital stock was fixed at \$200,000, in shares of \$100 each, by the charter, with the privilege of increasing the same to \$300,000. Various persons subscribed for stock under an agreement in writing, incorporated as part of the contract of subscription, that no assessment should ever be made upon the stock of the company, and that \$10 upon each share subscribed should be the sum total each should be liable to pay; it was held that, while such contract might be binding between the corporation and stockholder, by doctrine of estoppel, it was void as against creditors of the corporation, and as against public policy and justice, and creditors might enforce payment of such

stock, to the extent of their demands, against the corporation. *Id.*

109. **RELEASE OF LIABILITY.** A release of a stockholder by a creditor from all personal liability for the debt of the corporation discharges the corporation and all of the stockholders as fully as the party to whom the release is executed. If the release be of the releasee's proportion of the indebtedness, the corporation and remaining stockholders are thereby released only pro tanto. Such release is sufficient to sustain a plea of payment in an action against a stockholder for his proportion of the debts of a corporation under the act of the legislature of California of 1863; *Prince v. Lynch*, 1-186.

110. — The governing officers of a corporation can not, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of the creditors of the company, except by fair and honest dealing and for a valuable consideration; *Sawyer v. Hoag*, 5-25.

111. — An alteration in the organization, or purposes, of a company, which will operate to release a subscriber, to its stock, from his subscription, must be fundamental and an alteration not provided for, or contemplated, by either its charter or the general laws of the state; *Nugent v. Supervisors*, 5-52.

112. — Changes in matters of detail, not affecting the substantial nature and material features of the engagement, as intended and entered into by a subscriber to the stock of a railroad corporation will not release him. *Id.*

113. **INVALID PAYMENT FOR.** An arrangement by which stock is nominally paid for, even though the money passed, by which the money is returned as a loan to the stockholder, changes the character of the debt from one of a stock subscription unpaid to that of a loan of money, wherefore, it is not a valid payment for the stock, as against creditors; *Sawyer v. Hoag*, 5-25.

114. **LIABILITY OF STOCKHOLDER.** The printing of the words "non assessable," upon a certificate of stock, does not cancel or impair the obligation to pay the amount due upon the shares created by the companies held by any individual. At most the legal effect of the use of such words upon a certificate is but a stipulation against liability from assessment or taxation after the entire subscription has been paid; *Upton, assignee, v. Tribilcock*, 5-111.

115. **PURCHASE BY CORPORATION.** Unless in some special cases, a corporation may not buy its own stock and pay for it from its capital; *Crandall v. Allen*, 10-102.

116. — The funds of an insolvent corporation can not be taken to buy in a portion of its capital stock at the expense of the remaining stockholders; and, in the state of New Hampshire, such purchase is expressly prohibited, under penalty, by general statute (chapter 135, §§ 3, 7); *Currier v. Lebanon Slate Co.*, 8-377.

117. **PURCHASE BY CORPORATION.** A corporation which is solvent, whose capital stock is fixed and limited, but which has not been fully paid in, can not relieve a delinquent stockholder from the payment of assessments upon his stock, levied or subject to be called in, by a purchase of such stock, especially against the protest of another stockholder, urged in apt time. *Id.*

118. —. Private corporations may purchase their own stock in exchange for money or other property, and hold, re-issue or retire the same, if it is done in entire good faith, and the exchange is of equal value, and is free from all fraud, actual or constructive, and if the corporation is not insolvent or in process of dissolution; and the rights of creditors are not affected thereby; Clapp et al., exec'rs, *v.* Peterson, 9-172.

119. —. The purchase of its own stock by a corporation, by the exchange of its property of equal value—in this case real estate—though made in good faith and without any element of fraud admixed, there not being any thing in the apparent condition of the company to interfere with the making of the exchange, will not be allowed where it injuriously affects a creditor of the company; even though the fact of indebtedness was not, at the time, established or known to the stockholder. *Id.*

120. **INSTANCE.** Where a stockholder of a corporation surrendered \$55,500 of his stock to the company, and received real estate of equal value therefor, and the stock was cancelled, and it appeared that prior to that the company had purchased property of a third person, in which fraud was afterward discovered and established, and a decree rendered against the company for over \$5,000, and that an execution issued after such a decree was made was returned nulla bona, it was held, that the exchange of the stock for the real estate, and the cancellation of the stock, was a withdrawal by the stockholder of his share of the capital stock, leaving the creditor's debt unpaid; that the transaction was to the injury of the creditor; that the property so taken by the stockholder stood charged with a trust for the payment of the decree; that the stockholder could not be held an innocent purchaser, and that the property in his hands was in equity liable for the payment of such decree. It may be different where the corporation exchanges property for other property of equal value, or sells for money; for, in such case it receives an equivalent which is liable for its debts. *Id.*

121. —. There are numerous cases which hold that a corporation may purchase the shares of stock it has issued to individuals and violate no duty to the stockholders, unless such purchase be prohibited by charter; Chetlain, adm'r, *v.* Republic Life Ins. Co. et al., 6-397.

122. —. A corporation—in this case a railroad company—may, for legitimate purposes and when not, by charter, forbidden

purchase shares of stock which it has issued to individuals or corporations, and such a sale is sufficient consideration to support an agreement to pay money; *Chicago, Pekin & Sou. W'n R.R. Co. v. Town of Marseilles*, **6-387**.

123. **INSTANCE.** A corporation, organized under the general law of the state of Iowa, which, by the words of its articles of incorporation, assumes, among others, the power to purchase, sell, or exchange any real estate or other property deemed desirable in the transaction of its business, has power to make a valid and binding contract for the purchase of shares of its own stock; *Iowa Lumber Co. v. Foster et al.*, **6-542**.

124. **BOUGHT WITH CORPORATE FUNDS; IN TRUST FOR STOCKHOLDERS.** Where unissued stock of a corporation was, by agreement of the stockholders, there being no creditors, paid for with funds of the corporation, and the stock issued to one of the stockholders to be held in trust for all in proportion to the stock held by them, held, such issue was valid, and the directors had no authority afterward to direct the stock to be sold; *Jones v. Morrison*, **10-657**.

125. **WITHDRAWAL OF CAPITAL STOCK.** Any arrangement, the effect of which would be to withdraw the capital stock of a corporation, and turn it over to the stockholders, except in the manner provided by law, is in violation of that provision of the statute of California, which forbids the trustee of a corporation "to divide, withdraw, or in any way pay, to the stockholders, or any of them, any part of the capital stock of the company," and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangements at the time the credit was given; *Martin v. Zellerbach*, **1-170**.

126. **EQUITABLE RELIEF.** A court of equity will not lend its aid to the enforcement of a contract prohibited by law and will not enforce, as against a creditor, an arrangement made for the withdrawal of the capital stock of a corporation to the prejudice of creditors. *Id.*

127. **POWER TO CHANGE.** Corporations have not, either at common law or under the statute, any implied power to effect a change in their capital stock; *Grangers Life & Health Ins. Co. v. Kamper*, **10-21**.

128. **HOW ALLOWED.** An increase of capital stock can only be made in conformity with the provisions of law, by the body of the corporators, convened in meeting for that purpose; *Finley Shoe & Leather Co. v. Kurtz*, **6-593**.

129. **OFFICERS CAN NOT CAUSE.** It is not within the implied powers of any corporate officer to obligate the corporation to an increase of the capital stock. Therefore, such officer could not make a binding agreement with an employe of the company, that he should receive stock of the corporation, in payment of money advanced, or for his services. *Id.*

130. **RIGHT OF RESCISSION.** An increase of capital stock was voted by the stockholders of a corporation, out of the surplus earnings of the corporation, which were ample for a special purpose, which purpose soon after became impracticable; the vote was rescinded; no stock was issued, and no certificate of increase was filed, according to law. There was no increase of stock; the vote to increase is not per se an increase; there was full power to rescind; and, if the vote gave any rights, acquiescence would waive them; *Terry v. Eagle Lock Co. et al.*, 6-319.

131. **WHO MAY QUESTION IT.** The question whether the capital stock of a corporation has been properly increased is one the state only can properly raise; *Pullman v. Upton*, 6-34.

132. **AMENDMENT OF CHARTERS.** Authority to increase the capital stock of a corporation may, undoubtedly, be conferred by a law passed subsequent to the charter; but, such a law should, regularly, be accepted by the stockholders. Assent might be inferred by subsequent acquiescence, but, in some form or other, it must be given to render the increase valid and binding on them; *Ry. Co. v. Allerton*, 5-39.

133. **INCREASE OF.** Where the charter, of a corporation, declares that the capital stock of the corporation shall be a certain amount, named, and that it "may be increased, from time to time, at the pleasure of the said corporation," and, further provides, that "all the corporate powers of the said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint," the directors, without express authority, have no power to increase the capital, without submitting the matter to the stockholders in a regular way. *Id.*

134. —. A power given to a corporation to increase its capital stock can not be exercised by the directors, except they be specially authorized so to do, either by clear expression of the charter, or by the shareholders; *Eidman et al. v. Bowman et al.*, 4-347.

135. —. When a corporation determines to increase its capital stock, within the limits of its charter, each of the previous shareholders has a right to a proportionate number of the new shares, or a proportionate amount of the new stock, if it should be added to the old shares. He may waive this right, but if he does not, and is deprived of it, he may sue the company, by a special count in assumpsit, and recover for the loss. It has been held, the measure of damages is the excess of the market value of the stock above par value at the time of payment of the last instalment, with interest on the excess. *Id.*

136. —. A corporation being empowered to increase its capital stock, when such increase is determined upon, the right to the remainder of the stock, when it shall be issued, vests in the original stockholders, in proportion to the amount each holds of

the original stock, if they will pay for it, and is as fully theirs as is the stock already held, and for which they have paid. *Id.*

137. INCREASE OF. Where a corporation has power to increase its capital stock, such power is in trust for the subsisting stockholders in proportion to the original stock held by them, and each stockholder has a right to an opportunity to subscribe for and take the new or increased stock in proportion to the old stock held by him. And a vote at a stockholders' meeting directing the new stock to be sold, without giving a stockholder such opportunity, unless he consents to it, is void, as to him; *Jones v. Morrison*, 10-657.

138. —. Under a constitutional clause prohibiting a "fictitious increase of stock," an increase of stock necessary to carry on and extend the business of the corporation, is lawful; *Stein v. Trustees Spring Valley Water Works*, 10-64.

139. —. Where the statute provides the manner in which the capital stock may be increased that method must be pursued; *Grangers Life & Health Ins. Co. v. Kamper*, 10-21.

140. —. Any attempt to increase the capital stock beyond the limit named in the charter, without legislative sanction, is ultra vires, the stock itself is void, and confers on its holder no rights, and subjects him to no liabilities. *Id.*

141. —; INSOLVENCY OF CORPORATION. The rule is not changed if the corporation is insolvent and its stock of doubtful value, and the stock is issued to a creditor in settlement of a demand which it had no other means of paying; *Jackson v. Trauer*, 10-393.

142. —. The charter of a corporation provided that the capital stock of the company might be increased and that if it should be increased, the stockholders, at such time, should have the privilege of taking shares of the new stock, proportioned to the amount of stock they, at the time of the increase, held, within sixty days of the publication of notice of the increase. On the expiration of that number of days, the stock not taken by the original owners, might be disposed of by the directors for the benefit of the association. To entitle the stockholder, in such case, to demand such additional shares—shares of the new stock—it must be that he shall apply for the shares and pay over, or tender the money necessary to purchase and pay for the same, before the expiration of the sixty days, or before the expiration of any additional time allowed under the discretion given to the directors, during which the stockholders may exercise their privilege; *Hart et al. v. St. Charles Street R.R. Co.*, 7-209.

143. DECREASE OF. A statute (Gen. Stat., N. H., ch. 134, § 6), which authorizes a corporation at any meeting called for the purpose, to reduce its capital stock and the number of shares therein, does not empower such corporation to effect such reduction by purchasing the shares of a particular subscriber. Unless a course is adopted which will work exact and even justice to all

the owners of stock, the statute is inoperative; *Currier v. Lebanon Slate Co.*, 8-377.

144. **DIMINISHING STOCK.** Power devolved on directors to prosecute the business of a corporation and to make contracts will not authorize such directors either to increase or diminish the capital stock; *Gill v. Balis*, 8-257.

145. —. Where a corporation agrees with its stockholders to issue certificates of stock for the amount of their subscriptions paid in and cancel the subscription as to the amount not paid, this is not a diminishing of its capital stock, as the remaining stock still belongs to the company, to be disposed of; *Chetlain, adm'r, v. Republic Life Ins. Co. et al.*, 6-397.

146. **SURRENDER OF STOCK.** The board of directors of a corporation passed a resolution, in effect, that all stockholders who would pay five per cent. on their respective shares of stock and surrender their stock certificates to the company, should have the privilege of retiring from the company and withdrawing their stock notes. In an action to recover the several amounts of unpaid subscriptions to stock from the stockholders, held that a compliance with such terms proposed would not be effectual to release their obligations on the stock. Such action on the part of the directors was ultra vires the corporation and fraudulent as to creditors and stockholders, inasmuch as its effect was to diminish the capital stock, which was beyond the power of directors save by vote of the stockholders; *Gill v. Balis*, 8-257.

147. **LIEN OF CORPORATION ON.** In the absence of contract or provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it, to secure such indebtedness; *Farmers & Mechanics Bank of Lineville v. Wasson*, 6-538.

148. **NATURE OF INDIVIDUAL LIABILITY.** A personal liability of stockholders, for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed, by the act of becoming a stockholder; *Lowry et al. v. Inman*, 4-549.

149. **EXTENT OF PERSONAL LIABILITY.** The operation and effect of the statute, or the liability of the stockholder, which is measured by it, can not be extended by implication. There is no implied undertaking of the party as a stockholder; there is no obligation resulting from that relation, other than such as is expressed in terms, or by necessary implication, in the act of incorporation. *Id.*

150. **PERSONAL LIABILITY; RULE OF CONSTRUCTION.** By the common law the individuality of the members of a corporation was merged in the associated body, so far as liability for debts was concerned. Whenever there is a clause in this particular, in the

act of incorporation, it is, so far, in derogation of the common law and is to be strictly construed; it is not to be extended by implication; *Moyer v. Penn. Slate Co. et. al.* and *Keller v. The Same*, 4-136.

151. **PERSONAL LIABILITY.** The individual liability of stockholders in a corporation, for the payment of debts, is always a creature of statute. At common law it does not exist. The statute which creates it may, also, declare the purposes of its creation and provide for the manner of its enforcement; *Pollard v. Bailey*, 5-68.

152. —. The constitution of California requires that the debts of corporations be secured by the personal liability of the stockholders, and makes each stockholder liable for his proportion of such debts; this leaves to the legislature the power to regulate such liability, and to prescribe the rule by which each stockholder's proportion of such debts shall be ascertained; *Larabee v. Baldwin et al.*, 1-207.

153. **STATUTE.** An act making each stockholder liable for his share of all its debts while he was a stockholder is a sufficient compliance with the requirements of the constitution. *Id.*

154. **CONSTITUTION; EXISTING DEBTS.** The provisions of the constitution do not render a stockholder liable for a proportion of the debts of the corporation existing at the time he became a stockholder. *Id.*

155. —. The act of 1850 (California) concerning corporations has no application to corporations formed under the act of 1853, for "manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce." The act of 1853 repealed the act of 1850, so far as these classes of corporations are concerned; *Larabee v. Baldwin et al.*, 1-207.

156. **MINING CORPORATION.** The statute of California concerning mining corporations provides, that "each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company, contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted." Held, that the right of action against the stockholder is not contingent upon a recovery against the corporation, but accrues at the same time against both the stockholder and the corporation; *Davidson v. Rankin et al.*, 1-199.

157. **LIABILITY OF, FOR DEBTS.** It is not clear that section 4 of the act of the legislature of the state of Indiana of 1859, relating to ditching associations, does not impose upon the members of such associations an absolute liability for the debts thereof. If the liability is collateral, nothing more can be required of the creditor than to show that he has been unable to compel payment by the ordinary process of law; *Todhunter et al. v. Randall*, 1-349.

158. **PERSONAL LIABILITY ; LANGUAGE CONSTRUED.** An act incorporating a slate company, provided that the stockholders should "be, jointly and severally, liable in their individual capacity, for debts due mechanics, workmen and laborers, employed by said company, and for materials furnished said company." This did not include hauling of slate, repairing wagons, lumber for erecting machinery, provender for horses used for the company, powder for blasting, tools etc. The words "materials furnished," had reference only to such as form part or portions of the products of the establishment; *Moyer v. Penn. Slate Co. et al.*, 4-136.

159. —. In Illinois the stockholders of all insurance companies, which are subject to the general insurance law of 1869, are liable for the debts of the company to the full amount of their respective shares of stock, where the full amount of the capital subscribed has not been paid in; *Butler v. Walker*, 5-333.

160. —. It was provided by the constitution of a state (Missouri) that each stockholder in a corporation should be "individually liable for its debts, over and above the stock owned by him," in a further sum, at least equal in amount to such stock. A corporation was created which incurred debts. By a subsequent re-incorporation it became authorized to receive subscriptions for and issue additional stock, which it did not presently do. The constitution was afterward amended, to provide, that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him." The corporation then issued its new stock to subscribers. The holders of such new stock are not liable personally under the constitutional clause repealed; *Ochiltree v. R.R. Co.*, 5-78.

161. —. Such an amendment of the constitution does not impair the obligation of a contract. *Id.*

162. —. In Missouri the creditor of a corporation has no claim against the individual stockholder, until he has exhausted his remedy against the company; or, rather, his claim commences at the time he issues his execution against the company; *Miller et al. v. Great Republic Ins. Co. et al.*, 4-507.

163. —. Where, before any execution is issued, the stockholder shall have, honestly and without any intention to defeat the creditors of the company, sold and transferred his stock, the mere fact that the purchaser was insolvent at the time, is not sufficient to hold such stockholder still liable for the debts. The question, in such case, is whether the transfer was fraudulent and void as to the creditors of the company. If the stockholders knew of the insolvency of his alienee at the time of the transfer, it would be very strong evidence of fraud. *Id.*

164. —; **CONSTITUTIONAL REPEAL.** The adoption of a constitutional amendment abolishing the laws imposing personal liability upon the stockholders for the debts of a corporation does not operate to discharge the liability of a stockholder on an indebtedness

incurred prior to such adoption. To give the amendment such effect, as to creditors of the corporation existing at the time of the repeal, would be to sanction a law impairing the obligation of contracts and void; *Provident Savings Institution v. Jackson Place Skating and Bathing Rink*, 4-521.

165. **PERSONAL LIABILITY; CONSTITUTIONAL REPEAL.** A statute creating the personal liability of stockholders in banking corporations, provided that "the holders of stock in any bank, at the expiration of its charter, . . . shall be liable in their individual capacities, for the redemption and payment of all bills issued by said bank," etc. In order to give effect to the provision, it is not necessary that the charter of a bank should have expired by limitation. It is sufficient if it has expired by operation of law; *Dane et al. v. Young et al.*, 4-425.

166. ——. If there be a statute imposing a personal liability upon a shareholder for the debts of a corporation, a member of the association who would be liable, to the creditors of the company, if he continued such membership, will still be treated as a member, should he dispose of his interest to an insolvent person, or to another, with a view of exonerating himself from present responsibility. Otherwise, if before execution against the corporation, the stockholder honestly and without any intention to defeat the creditors of the company, sold and transferred his stock, notwithstanding the insolvency of the purchaser; *Provident Savings Institution v. Jackson Place Skating and Bathing Rink etc.*, 4-524.

167. ——. The charter of a corporation containing no individual liability clause, and no general statute of the state, in existence at the time the charter was granted, imposing such liability, it was held to be without the power of a majority of the stockholders, by any by-law, to impose any such liability. Nor will equity sustain a bill to impose such liability against individuals as stockholders. If there be a remedy in such case it is against the individual upon the fraudulent misrepresentations made to those who may have lent money etc. upon the faith of them; *Reid et al. v. Eatonton Manuf. Co.*, 3-219.

168. ——. The stockholders of a bank are primarily debtors to the depositors, and are liable co-ordinately with the corporation; *Mitchell v. Beckman*, 10-55.

169. **INDORSEMENT ON NOTES OF ISSUE.** A banking corporation printed upon the face of its notes the words "individual property of stockholders liable," the object being to give credit and currency to the bills. No personal liability attaches to a stockholder, albeit he signed the notes, as an officer of the corporation, other than such as the statute creating the corporation designated. The indorsement, upon the bills, is but a notice to the public of the charter liability; *Lowry et al. v. Inman*, 4-549.

170. **FOR JUDGMENT DEBTS.** As stockholders in a corporation are not sureties of the corporation, but principal debtors, their

liability is not extinguished, merged or suspended by the rendition of a judgment against the corporation. Such liability ceases only when the debt is satisfied or extinguished; *Young v. Rosenbaum et al.*, 3-139.

171. NOTES TO ABANDONED ENTERPRISE. Where subscribers to the stock of a railroad company had given their notes for the amounts of subscriptions, payable when the road should be completed, but were subsequently induced to take up these notes, and to give new ones, payable in four years, in order to enable the company to carry out a contract for the completion of the road, and upon the confident but honest expression of opinion by its officers, that if they would do so, the road would be completed under such contract in less than four years: Held, that, although the said contract for building the road was, afterward and before any thing had been done under it, abandoned by the contractor, and the road has never been completed, yet the subscribers are liable upon their said new notes; *Four Mile Valley Co. v. Bailey et al.*, 3-659.

172. LIABILITY ON STOCK. The liability of a stockholder on his stock unpaid for is not affected by the fact that, notwithstanding his withdrawal from the company, by assent of directors, the unpaid stock notes of other subscribers, who did not withdraw or retire, are sufficient to pay all creditors; *Gill v. Balis*, 8-257.

173. LIABILITY, HOW ENFORCED. If the charter makes the private property of stockholders liable for the fulfilment of the contracts of the company and points out no mode in which this liability may be made available, and the courts of other states may give effect to the provision, the course of proceeding must be regulated by the law of the state where the remedy is sought to be enforced; *Lowry et al. v. Inman*, 4-549.

174. —. If the effect of the charter and the substance of the obligation of the corporation is not to charge the property of the stockholder generally, but only to an amount equal to his stock, upon prescribed conditions and by a specific process, the remedy of the creditor must be sought according to the terms and by the means provided by the charter. *Id.*

175. —. The charter of a corporation provided that it "shall not, at any time, contract debts exceeding three-fourths of the amount of its capital stock paid in, and, if such indebtedness shall exceed the amount aforesaid, the directors and stockholders shall be personally holden to the creditors of said company." The act provided no means of enforcing the liability. Held, (1) the creditor may resort to the common law remedy; (2) the clause rendered the directors and stockholders jointly liable; the word "personally" is used to distinguish their joint liability as individuals from their liability as directors and stockholders; (3) the liability attaches at once when the indebtedness exceeds the legislative limitation and to such persons as were then directors and

stockholders, and not on those who may have become such at a subsequent period, as when suit was brought; *Windham Provident Institute for Savings v. Sprague et al.*, 4-199.

176. **LIABILITY, HOW ENFORCED.** A joint and several action may be maintained against stockholders of a corporation for corporate debts; *Larabee v. Baldwin et al.*, 1-207.

177. —. Under a statute making each stockholder "individually personally liable for his proportion of all the debts and liabilities of the company," any creditor is entitled to sue any stockholder for such proportion of the indebtedness of the company to such creditor, as the stock of such shareholder bears to the whole stock of the company; *Morrow v. Superior Court*, 10-62.

178. —. The stoppage of payment by a bank gives a depositor an immediate cause of action against the bank and the stockholders for the amount of his deposit; *Mitchell v. Beckman*, 10-55.

179. **SUIT FOR BALANCE DUE; STATUTE OF LIMITATION.** The action of a corporation against a stockholder for the balance due on stock, where the debt is not evidenced by any writing, is barred by the statute of limitations in five years and this limit can not be extended in favor of a creditor of the corporation who seeks to subject such unpaid balance to the satisfaction of his debt; *First Nat. Bank of Garrettsville v. Greene*, 10-384.

180. —; **WHEN CAUSE OF ACTION ACCRUES.** The right of action which the code gives the creditor of a corporation against a stockholder, to the extent of the unpaid balance due upon the stock, accrues whenever it is clear that the corporation has no property from which the claim may be collected, and not from the time judgment is recovered against the corporation. Such judgment is not necessary to the beginning of an action against the stockholder, though it may be necessary as evidence to determine the amount to be recovered. *Id.*

181. **CONTRIBUTION; STATUTE OF LIMITATIONS.** A claim by a corporation for contribution from its stockholders is prescriptible like other debts. Prescription begins to run from the time the call is made; *President etc. v. Lord*, 10-491.

182. —. The state loaned its credit to a certain banking institution, and afterward, upon the insolvency of the corporation, assumed control of its affairs in winding up. Subsequently, the state, by legislative act, permitted the stockholders to share in its management, and by the same act it was proposed that a certain fixed contribution should be paid by each shareholder for a stated number of years, to realize a fund whereby to re-imburse the state and pay its debt. Held, that when the stockholders accepted the act and levied the assessment, a contract was thereby made with the state, which neither could violate. Held, further, that a subsequent attempt by the state to impose a further contribution,

upon each shareholder, was in violation of that contract and could not be enforced. *Id.*

183. **SUBSCRIPTION TO PAY INDEBTEDNESS.** Where the stockholders of a corporation, the corporation having become indebted beyond the amount subscribed, subscribed to an agreement promising to pay the sum set opposite their names etc., for the purpose of liquidating the debt against the corporation, and all but one paid their subscription, and the business of the corporation was continued for three years after, held, that assumpsit would lie against the delinquent subscriber in the name of the treasurer for the benefit of those who were creditors at the time of the subscription; *Haskell v. Oak*, 10-517.

184. **PERSONAL LIABILITY; DEFENSE.** In an action, by a depositor against a stockholder in an insolvent incorporated savings bank, under a provision of the charter of the association, that the stockholders "shall be held and bound in their private capacity, in proportion to the number of shares held by each and every one of them, for the ultimate redemption of all deposits made with said company," brought to recover the amount of plaintiff's deposit, the stockholder may defend the suit by showing that, previously to the commencement of the suit, he has discharged his obligation by paying to depositors, other than the plaintiff, an amount equal to the full proportion his stock bears to the whole amount due the depositors. Such payment can not, after one depositor has commenced suit against such stockholder on his liability, defeat such suit, even though the stockholder pay to the full amount of his liability. Such payment, after notice of suit, is in fraud of plaintiff's claim and contrary to the policy of the statute creating the liability; and, if allowed, would practically defeat the object of the legislature in imposing the obligation; *Jones, trustee, v. Wiltberger*, 4-338.

185. —. In a proceeding, by a judgment creditor, to subject the property of an individual stockholder to the payment of the judgment, it is a sufficient defense that by the articles of incorporation the stockholders are not liable beyond the amount of unpaid stock subscribed by them, and the defendant's subscription has been fully paid; *Spense et al. v. Iowa Valley Construction Co. et al.*, 5-364.

186. **EXTENT OF RECOVERY.** Under the act of 1853, entitled "An act to provide for the formation of corporations for certain purposes," each stockholder is liable for his proportion of the corporate debts; but any creditor whose claim is sufficient may collect from him the entire amount of his liability on all the corporate debts, leaving him to seek contribution from his co-stockholders; *Larabee v. Baldwin et al.*, 1-207.

187. **JUDGMENT.** A judgment rendered against a corporation while a party is a stockholder, upon a contract entered into before the relation of stockholder existed, is not a contract within the

meaning of the act which makes a stockholder liable for the debts of the corporation contracted while he was a holder of stock. *Id.*

188. CONTRIBUTION. To ascertain the proportion for the payment of which a stockholder is liable, it is necessary to ascertain the whole amount of existing indebtedness created while he was a stockholder. *Id.*

189. —. Where stock and property has been divided between stockholders, before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt, he may resort to his associates for equitable contribution. With that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors; *Bartlett v. Drew*, 4-634.

190. —. On a decree in a suit by a stockholder who has paid debts of a corporation, brought under the Massachusetts statute for contribution, against one who holds such stock as guardian, the real estate of such of the wards as are minors at the time of the levy can be taken on execution, but not the real estate of such as have come of age before the decree; *Mansur et al. v. Pratt*, 3-397.

191. —. To render a subscriber to stock an owner, so as to become liable for debts of the corporation, it is not necessary that he should have paid for his stock, nor that a certificate therefor should have been issued. A corporation may give credit for its stock, and when it has agreed that a person shall be entitled to certain shares of its stock, to be paid for in a certain manner, and he consents to take the stock, he becomes owner; *Mitchell v. Beckman*, 10-55.

192. EVIDENCE OF OWNERSHIP. In an action against a stockholder to recover a proportional share of one of the corporate debts, the evidence must show that he was a stockholder at the time the debt was contracted. A judgment against the corporation does not prove when the debt upon which it was recovered was contracted. *Id.*

193. —. A creditor of a corporation, seeking to fasten a personal liability on a stockholder, is not compelled to prove the ownership of stock by record evidence. The admissions of the defendant and the testimony of corporate officers is amply sufficient to that end; *Dows v. Naper*, 6-424.

194. —. In an action to charge one as a stockholder under section 9 of the act of February 18, 1857 (of Illinois), it appeared, in evidence, that no certificate of stock ever issued to defendant; that at the organization meeting he, with others, signed a paper agreeing to take and pay for shares; that he was elected and for seven months acted as president of the company and that, while so acting, he deliberately admitted his interest to several persons. It was held that these facts showed the defendant to be a stock-

holder, so far as the rights of third persons were concerned; *Corwith et al. v. Culver*, **5-244**.

195. **EQUITABLE OWNERSHIP.** The mere fact that the plaintiff is the equitable owner of shares of the stock of a corporation may not subject him to the liabilities or disabilities of a stockholder; *Thompson v. Bemis Paper Co. et al.*, **7-506**.

196. **INSTANCE.** A. made a contract with B., for the purchase of a certain number of shares of the capital stock of a corporation and paid part of the stipulated price; but, the stock was not then transferred to him. While the stock stood in B.'s name on the books of the corporation, A. attended meetings of the corporation and voted as a stockholder. At one of these meetings a vote was passed to divide the cash assets among the stockholders, A. voting in the affirmative. After this a settlement was had between A. and B., the stock was transferred to A. and he was credited with dividends received, including that from the withdrawal of the cash assets. A. then brought an action against the corporation for a debt due from it to him, recovered judgment, and, the corporation neglecting to pay for thirty days after a demand duly made upon it, brought a bill in equity, under a statute giving such remedy, for the benefit of such creditors as may join in the proceedings to enforce the personal liability of the other stockholders, on the ground of the withdrawal of the capital stock while there were debts outstanding. The bill could not be maintained. *Id.*

197. **IN HAND OF EXECUTOR.** Executors of the estate of one deceased take stock in a corporation, the property of deceased, subject to any liability which existed on account of it; wherefore, if testator was liable to a creditor upon such stock, the executors, as his representatives, will be liable; *Chase v. Lord et al.*, executors etc., **8-575**.

198. **VOTING.** A stockholder may vote stock standing in his own name on the books of the company, notwithstanding he may have sold some of said stock prior to the meeting at which the vote is cast, if such stock has not at the time been transferred on the books of the company; *People v. Robinson*, **10-59**.

199. **STOCK HELD FOR CORPORATION.** Stock of a corporation held in trust for the benefit of the corporation, is subject to its order and, so far as the right of voting on the shares is concerned, the holding is the same as if it were by the corporation itself. Wherefore, until they are sold and transferred, by the corporate authority, the right of voting upon them is suspended: *American Ry. Frog Co. v. Haven et al.*, **3-418**.

200. **STOCK HELD IN COMMON.** In a case where execution against a corporation was returned nulla bona, it was admitted that no part of the capital stock of the corporation had been assigned to subscribers or paid in, and no certificate thereof had been recorded, the corporation having, however, been called into existence by the

signing of articles of association, the holding of a first meeting and election of officers. Held, that the associated members were the holders of the whole capital stock in common and, semble, liable in equal proportions of the judgment indebtedness; *Harris v. Anglo Saxon Petroleum Co.*, **3**-408.

201. **HELD AS COLLATERAL.** Whether a party to whom stock is hypothecated as collateral security, thereby becomes a stockholder in, and member of the corporation, is not decided; *National Exchange Bank v. Sibley*, **10**-165.

202. —. But a party receiving from the directors such stock in hypothecation, is not, because of having subsequent dealings with the corporation, thereby estopped from prosecuting a suit against the persons comprising its board of directors, for their alleged deceit in procuring the loan of worthless stock. *Id.*

203. **PLEDGE.** When shares of the capital stock of the corporation are issued to a trustee to secure the payment of a debt, the transaction constitutes a pledge of the stock, and the title to it remains in the corporation; *Brewster et al. v. Hartley et al.*, **1**-233.

204. —. A trustee has prima facie no right to pledge certificates of stock held by him as a part of his trust fund to secure his own debt growing out of transactions independent of the trust; *Shaw v. Spencer*, **1**-625.

205. **NOTICE TO PURCHASER.** If a certificate of stock expressed to "A. B., trustee," is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accept the pledge without he does so at his peril. *Id.*

206. **STATUS FOR PURPOSES OF TAXATION.** For the purposes of taxation, the capital stock is the representative of its property and, in the state of Maryland, both can not be taxed. The exemption of the one carries with it the exemption of the other; *State of Maryland v. Wilson, president etc.*, **7**-404.

207. **TAXATION OF.** A corporation having a capital stock divided into shares, is not liable to be taxed for its cash in treasury; *City of Fall River v. County commissioners etc.*, **7**-482.

208. —. In Indiana there can be no assessment of the capital stock of a foreign corporation as against the corporation itself; *Seward v. City of Rising Sun et al.*, **7**-111.

209. —. The shares of capital stock of a foreign corporation are taxable when owned by individual citizens of the state. In the absence of a statute to the contrary, although a corporation may be taxable for its corporate property, the owners of shares of its stock may be taxed therefor where they reside. *Id.*

210. —. The property or interest of an individual in a bank, commonly called a share of capital stock, is a different thing from the capital of the bank owned and held by the corporation. When the latter is invested in the securities of the government

of the United States it is exempt from taxation by state authority, but this does not exempt the share of the individual from taxation; *Nat. Bk. v. Commonwealth of Kentucky*, **3-12**.

211. **TAXATION OF.** The shareholders in national banks are subject to taxation, although the entire capital of the bank is invested in the securities of the federal government; *Lionberger v. Rouse*, **3-17**.

212. —. A bank can not maintain an action to restrain the collector of taxes from levying upon the shares of individual stockholders for taxes assessed on such shares; *Waseca Bk. v. M'Kenna*, **10-676**.

213. **CANCELLATION OF STOCK.** Plaintiff is a stockholder in the defendant association. Defendant's eighth article of incorporation provides that "upon the termination of the corporation, the funds and assets of the same, after paying all debts and expenses, shall be divided among the stockholders in such proportion as each may be justly entitled to, in accordance with the number of shares held by each, after deducting all assessments, fines, dues and other charges, then due by such stockholders. Under this article plaintiff, so long as he performs his duty as a stockholder, is entitled to retain his stock and his place as a stockholder until the termination of the corporation, and to a right to share of net funds and assets, as in such article provided. So long as he performs his duty as a stockholder, he can not, save by his own consent, be forced out of the association — in this case a building association — as respects the whole or any part of his stock, by any action of the association, through its board of directors or by the combined action of the other stockholders. Hence, the association has no authority to retire or cancel any part of his stock against his will and without any default on his part, any such retiring or cancelling being ultra vires; *Bergman v. St. Paul Mut. Building Ass'n*, **9-492**.

214. **FORFEITURE OF SHARES.** Repeated declarations, by resolutions of the corporation, that the stock of delinquent subscribers will be forfeited unless payment be made by a time fixed, do not amount to a forfeiture of the shares. To work a forfeiture there must be an actual declaration thereof; *Water Valley Manuf. Co. v. Seaman*, **8-32**.

215. **CONFISCATION; SEIZURE.** A seizure of stock in a railroad company may be made by giving notice to the president or vice president of the company, and such a seizure, made in obedience to a warrant and monition, is sufficient to give the district court jurisdiction; *Miller v. United States*, **3-63**.

216. —. The aid of a state statute is not necessary to the seizure of stocks and credits, in admiralty and revenue cases. *Id.*

217. **CONFISCATION OF STOCK BY AUTHORITY OF CONFEDERATE STATES.** A decree of confiscation of shares of the capital stock

of a corporation "by the district court of the confederate states of America, for the southern district of Georgia," on the ground that it was the property of alien enemies, its owners being citizens of the United States, not engaged in the effort to establish the government of the confederate states, is null and void; a purchaser thereunder acquired no title; and the company can not be compelled to issue to him certificates for such stock; *Central Railroad & Banking Co. v. Ward et al.*, **1-299**.

218. ALIENATION OF COMPANIES' PROPERTY. Corporate acts, by means of which corporate property is alienated, if not ultra vires and when performed according to the mode prescribed by law, are, in point of law, binding upon the corporation and, through that title, equally binding upon the interests of stockholders; *Wright v. Oroville Gold etc. Mining Co. et al.*, **3-146**.

219. CONVERSION OF STOCK. One who has not the legal right to stock of a corporation can not sustain an action against the corporation for converting it; *Morrison v. Gold Mountain Gold Mining Co.*, **6-240**.

220. WHAT IS NOT A CONVERSION. It is not a conversion of stock, by the corporation, where its president draws an order, upon himself as president, to transfer, to a person named, a certain number of the shares of the company which he as president and the secretary of the company refuse to deliver. *Id.*

221. REMEDY FOR WRONGFUL SALE OF STOCK. If a corporation unwarrantably disposes of the shares of a stockholder, the latter may recover the value of the stock at the time of such sale or, in some case, the money received by reason of the sale; *Marseilles Land & Water Power Co. v. Aldrich*, **6-406**.

222. TITLE TO STOLEN CERTIFICATES. Where the owner of shares of the capital stock of a corporation causes the certificate thereof to be transferred, on the books of the company, to another, as trustee, and the transferee indorses the same, by his signature, and delivers the same to the original owner; but, afterward, steals it from such original owner and sells it, one who in good faith, for full value, in the ordinary course of business and without notice of any claim of the original owner, purchases it from the thief, takes a valid title to the stock as against such original owner; *Winter v. Belmont Mining Co.*, **6-248**.

223. CASUAL FINDING AND PURCHASE. Where a corporation issues its certificate of shares of stock, transferable on the books of the company by indorsement and surrender of the certificate, and its owner loses the same after he shall have indorsed it, and it shall come into the hands of a bona fide purchaser for value, such purchaser acquires no interest in the stock; *Sherwood v. Meadow Valley Mining Co.*, **6-228**.

224. AT COMMON LAW. Shares of stock in incorporated companies are not leviable at common law and positive provisions of statute are requisite to enable a court of common law to apply its

power to them; *Van Norman v. Circuit Judge of Jackson Co.*, 6-663.

225. **LEVY ON SHARES.** Shares of stock in corporations are intangible entities and incapable of caption by the methods of the common law. In the absence of specific provision, by statute, affording means of the subjection of such shares to mesne process, the only safe proceeding against them is in equity. *Id.*

226. —. Statutes subjecting shares of stock in corporations to levy and sale on execution or attachment, are in derogation of the common law; *Nabring v. Bank of Mobile*, 6-124.

227. —. Shares of stock, in an incorporated company, are choses in action. As such they were not liable, by the common law, to levy and sale under execution, nor will they be made so liable by a statute which provides for a levy on personal property of a defendant, except things in action and an equity of redemption in either land or personal property. *Id.*

228. **LEVY ON SHARES PLEDGED OR MORTGAGED.** Shares of the capital stock of incorporated companies, pledged or mortgaged and so situated, are not liable to execution sale, unless expressly so made by statute. Such statute does not exist in Alabama; and, a purchaser takes no title, from an execution sale, against the pledgor or mortgagor, nor does he succeed to the rights of such pledgor or mortgagor in such shares of stock. *Id.*

229. **LEVY ON.** Attachments and executions can not be levied on shares of a corporation, as property of a debtor, when such shares stand on the corporate books, in the name of another, regularly assigned and transferred within the knowledge of the company; *Van Norman v. Circuit Judge of Jackson Co.*, 6-663.

230. **UNPAID BALANCE DUE ON.** The stock book of a corporation, containing subscriptions for unpaid stock, does not contain such evidences of debt, belonging to a debtor corporation, as are subject to seizure under execution issued against the corporation; *Hannah v. Moberly Bank*, 8-192.

231. —. The liability of a stockholder, to a corporation, for unpaid stock which is not due according to the terms of his subscription and for which no calls have been made by the proper corporate officers, can not be seized and collected under an execution against the corporation; and, in a proceeding at law, for the satisfaction of a judgment against the corporate debtor, such liability can only be reached by special execution awarded against the stockholder himself, in default of assets of the corporation whereon to levy. *Id.*

232. —. Where a stockholder is in default to the corporation for instalments of stock, or for sales made by the proper corporate authority, he stands in the attitude of a debtor to the corporation, and such debt may be seized and collected by suit under execution against the bank or be reached by garnishment. *Id.*

233. ATTACHMENT OF SHARES OF NON RESIDENT. Though a corporation does not own the shares of its capital stock, nor have any control over it, except as to the manner of transferring its legal title, yet, by force of the statute of Ohio (Code, §§ 194, 200), such shares in a corporation of that state, belonging, in law or in equity, to a non resident debtor, may be as effectively attached by making the corporation a garnishee, as if the stock were in its possession and under its control; *National Bank of New London v. Lake Shore & Michigan Southern Ry. Co.*, 4-13.

234. TRANSFER TO WIFE. An attachment issued against the property of a debtor can not be levied upon shares of stock in a corporation which he had previously and in form at least, sufficiently transferred to his wife, so that they stand on the corporate books in her name. Therefore, a bill in equity will not lie to protect any supposed lien of such an attachment nor can an injunction issue to restrain, in such case, the owner of the legal title to the shares from prosecuting a suit for the collection of dividends declared upon such shares of stock. If such injunction issue, and be not dissolved on motion, mandamus will be granted to vacate the injunction; *Van Norman v. Circuit Judge etc.*, 6-663.

235. STOCKHOLDER NOT BOUND BY DECREE TO WHICH HE IS NOT A PARTY. A stockholder in an insolvent corporation is not liable to an action on an assessment made by the court on his notes, executed and delivered upon subscription to capital stock, in a proceeding by the creditors against the company in which a receiver is appointed, on the petition of the receiver and creditors, where he is not made a party to either proceeding. Such an assessment is not binding on him; *Lamar Ins. Co. v. Gulick*, 9-109.

236. JUDGMENT SALE. Under a judgment against a county, stock she held in a railroad corporation was sold by the marshal. Held, that the purchaser took the stock as such but not any right in or to a collateral contract by which it was stipulated the railroad company would pay interest upon the stock; *Pittsburg & Connellsville R.R. Co. v. County of Allegheny*, 4-92.

237. SALE UNDER EXECUTION. A sale of shares of stock, in an incorporated company, belonging to a defendant in execution, under the execution, will not vest a title in the purchaser, if the defendant in the execution had none; nor will such purchaser acquire any greater or other rights than the seller had. *Mechanics Bank v. Merchants Bank*, 3-539.

238. CONTRACTS BETWEEN STOCKHOLDERS. Three persons, owning a majority of the stock of a corporation, have the unquestioned right to combine to control the election of the officers and the management of the company, and, if they could not agree, then, that they would ballot for directors and officers, when a majority should rule and the vote of the three should be cast as a unit, so as to control the election; *Faulds v. Yates*, 3-285.

239. —; VOID. A contract between two stockholders in a

corporation, by which one, in consideration of a sum of money paid to him by the other, agrees to vote for a certain person as manager of the corporation, and to vote to increase the salaries of the officers of the corporation, including that of the manager, is void, as against public policy, unless it be assented to by all the stockholders of the corporation. Whether it be valid if so assented to, *quære*; *Woodruff v. Wentworth*, 9-432.

240. CONTRACTS BETWEEN STOCKHOLDERS; VOID. It was alleged, in a declaration filed, that in consideration that plaintiff would do a certain act in relation to a corporation, of which the plaintiff and defendant were both members, defendant agreed to pay the plaintiff a sum named when certain bonuses were paid to defendant by the corporation; that the plaintiff did the act and the bonuses were paid to defendant by the corporation; and, that the defendant refused to pay the plaintiff the sum promised. Evidence, introduced on the trial, showed that defendant assigned the bonuses to a person to whom the corporation paid a portion of the amount due thereon; that the assignee sold the bonuses remaining for a sum less than the balance due, and that the purchaser was paid the full amount of such balance by the treasurer of the corporation, to whom, according to a previous agreement between them, the purchaser paid the difference between the total value of the bonuses and the whole amount paid to the assignee. The trial judge instructed the jury if they found that the corporation actually paid the whole amount of the bonuses to any agent of the defendant, this was such a payment of the bonuses to the defendant that the action could be maintained; but, if they found that the corporation had not paid the bonuses in full, but had succeeded, by any means, in purchasing them for a less sum than was due upon them, that would not be such a payment of them as would sustain the action. The court held defendant had no ground of exception. *Id.*

241. STOCKHOLDERS MAY CONTRACT WITH CORPORATION. There is no rule of law which prohibits a shareholder from dealing with, or from suing or being sued by, the company of which he is a member. The president of such company has the right, with his own funds, to purchase notes and drafts of the company maturing and, when he does so, he succeeds to all of the rights of the holders, or he, upon taking up, with his own means, such indebtedness, has a right to maintain an action, against the corporation, for money paid, laid out and expended for its use; *Merrick v. Peru Coal Co.*, 4-360.

242. DEALING WITH COMPANY. A stockholder or officer of a corporation has the right to deal with the company of which he is a member in the same manner as strangers may. When either does so, he acquires the same rights and incurs the same liabilities as a stranger would. *Id.*

243. STOCKHOLDER AS CREDITOR OF COMPANY. A creditor of a corporation, who is also a stockholder, may maintain an action, at law, to charge a trustee with a debt of the corporation, such liability being imposed by the statute under which the company is organized, by reason of the failure of trustees to make annual report of the financial condition of the company. The liability, of such trustees, is not affected by the knowledge of the creditor as to the financial condition and embarrassments of the company; *Sanborn v. Lefferts*, 4-647.

244. —. A member of a corporation, who is a creditor of such corporation, has the same right as any other creditor to secure the payment of his demands, by attachment or levy on the property of the corporation; although he may be personally liable to satisfy other judgments against the corporation; *Life Ass'n of America v. Levy etc.*, 7-264.

245. —. A stockholder may, certainly, become a creditor of the corporation in which he owns stock. As such creditor he may proceed to recover his debt; and, if his declaration discloses he is relieved from responsibility as a stockholder by the payment in full for all stock taken by him, he may maintain suit as a creditor against a fellow stockholder; *Weber v. Fickey, jr.*, use of etc., 7-385.

246. DISABILITY. A creditor who is also stockholder of a corporation, and as such liable for its debts, is not entitled to statutory remedies afforded creditors against stockholders for the debts of the corporation; *Thomson v. Bemis Paper Co. et al.*, 7-506.

247. —. A creditor who is also a member of a corporation can not maintain a bill, in equity, to enforce the personal liability of stockholders, for debts due by the corporation before capital stock paid in, under a statute which authorizes a proceeding for the benefit of a plaintiff and such other creditors as may come in and become parties to the proceeding; and, one to whom a stockholder has transferred a promissory note executed by the corporation, for the sole purpose of enabling him to obtain judgment upon it in his own name, and to bring a bill in equity to enforce the personal liability of the stockholder, stands in no better position than his assignor; *Potter v. Stevens Machine Co.*, 7-504.

248. SUIT FOR DEPRECIATION OF STOCK. A stockholder can not maintain an action against the corporation for damages in the depreciation of his stock resulting from the mismanagement of the officers, unless he shows that such injury is peculiar to him alone, and does not fall equally upon other holders of stock; *Oliphant v. Woodburn Coal Co.*, 10-374.

249. RESTRAINING ISSUE OF. Plaintiffs and certain directors of a corporation owned stock therein in partnership. At a meeting of the directors they consented to the making, by the corporation, of a contract, the directors being induced to give their consent, relying upon assurances exacted by them on behalf of the part-

nership, and with its knowledge that they should be allowed to participate in the transaction to which the contract related, and share in the profits thereof, and the partnership subsequently sought to avail itself of the benefits of the same. In an action to avoid the contract on the ground that it was fraudulent as to stockholders, held, that the plaintiffs being in *pari delicto*, the relief would not be granted; *Weed v. Little Falls & Dakota R.R.*, 10-669.

250. COUNTY; POWER. A county which owns stock in a railroad company has the same rights as to the management of the affairs of the company, and the selection of officers, as any other stockholder; and may enforce those rights by the same remedies which any stockholder may employ; *Hornblower v. Duden*, 2-86.

251. SALE OF CORPORATE ESTATE. It appears to be settled, as a general rule, that the officers of a corporation can not, against the wishes of a single stockholder, convey away the entire property from which the corporation derives its emoluments and which is essential to the business purposes of its organization. This rule is, however, subject to certain modifications in its application. The right of the stockholder in this regard is founded upon contract; but the contract can not imply that the business of the corporation must be persistently kept up to the ruin of all concerned; *Buford v. Keokuk N. Wn. L. Packet Co.*, 8-226.

252. —. It is not against public policy, for the majority of stockholders of a corporation which is on the eve of dissolution, by the efflux of time and operation of law, in the exercise of a sound discretion, to cause the transfer of its assets to another like corporation and take in payment therefor the stock of such other corporation and to convert the same into money for the purposes of liquidation. *Id.*

253. REMEDY AGAINST OFFICERS ETC. A stockholder of a corporation has a remedy in chancery against the directors of the company to prevent them from doing acts which would amount to violation of the charter, or to prevent any mis-application of the corporate capital, or profits, which may lessen the value of the shares of stock, if the acts intended to be done and complained of amount to what, in law, is called a breach of trust or duty; *Wilcox v. Bickel et al.*, 8-329.

254. REMEDY AGAINST INDIVIDUALS. A stockholder of a corporation has his remedy against individuals, in whatever capacity they profess to act, if the subject matter of the complaint shall be an imputed violation of a corporate franchise, or a denial of a right growing out of it, for which there is no adequate remedy at law. *Id.*

255. —. In such case an allegation in the petition to the effect that all of the officers of the corporation have absconded and their whereabouts is unknown, is a sufficient showing that it was impossible for the complaining stockholder to make demand on the officers, or managing directors, of the company, that proper

proceedings be taken in the name of the corporation for the protection of the property. *Id.*

256. **DIVERSION OF FUNDS.** A majority of stockholders, no matter how great, have not the right to divert the funds of an incorporated company to any other than the purposes for which it was organized; and, if such funds are about to be so diverted, a stockholder may file a bill in equity, against the company, to restrain it, by injunction, from such diversion or mis-application. Relief, however, will not be granted unless the corporation is about to do some act outside the scope of its authority, or in disobedience to the provisions of its constitution. So long as it exercises the power granted by the charter, the acts of the company must be treated, by the courts, as the acts of all the stockholders; *Dudley v. Kentucky High School*, 5-382.

257. **ESTOPPEL TO COMPLAIN OF MIS-APPROPRIATION.** If stockholders, one or more of them, have knowledge of the purpose to appropriate funds, about to be borrowed, otherwise than to corporate purposes, and when it is borrowed participate in the advantages derived from the misappropriation, they will not be, thereafter, permitted to set up such mis-application of the fund as a defense to an action by the lender who seeks to recover his money from the corporation; *Thompson et al. v. Lambert et al.*, 6-523.

258. **RIGHT TO MAINTAIN ACTION.** A stockholder may institute a suit in equity, in his own name, against a wrong doer whose acts operate to the prejudice of the stockholders, such as diminishing the dividends and lessening the value of their stock, in a case in which an application has been made to the directors of the company to institute suit in the name of the corporation, and they have refused; *City of Memphis v. Dean*, 3-1.

259. **ACTION BY.** A stockholder or creditor of a corporation can not maintain a suit for an injury to corporate rights, without showing by the allegations of his bill that the corporation has refused to take proper measures to protect such rights. An allegation that the corporation has refused to bring "this suit" is not sufficient; *Newby v. Oregon Cent. Ry. Co.*, 1-155.

260. **IN SUIT AGAINST TRUSTEES.** In an action by parties as stockholders of a corporation against their trustees, it is sufficient to maintain the action if either one of them was a stockholder; *Parrott et al. v. Byers et al.*, 4-282.

261. **ACTION AGAINST OFFICERS FOR FRAUD.** As the corporation, itself, holds its property as trustee for the stockholders who have a joint interest in all its property and effects, and each of whom is related to it as cestui que trust, if the corporation refuses to call to account, by proper legal proceedings, its directors and officers who are abusing their trust, mis-applying the funds of the corporation, and receiving profits from contracts made by other parties with the corporation, through their aid; or if such corporation is still under the control of those who necessarily must be

made defendants to such proceeding, so that it would be a mockery to require, or permit, a suit against them to be brought and prosecuted under their management, the stockholders, who are the real parties in interest, or a part of them, may maintain an action to make such officers, and all parties who have participated with said officers in their unlawful transactions, account for their wrongs and frauds; and the corporation is a proper party defendant with them; *Ryan et al. v. Leavenworth etc. Ry. Co. et al.*, 7-144.

262. ACTION AGAINST OFFICERS FOR FRAUD. Where one railroad corporation is the owner of a large amount of stock in a connecting railroad corporation and both of the corporations are under the potential control of the same persons, as officers of the corporations, and the officers of the connecting line of road are guilty of a mis-application of the corporate funds, for their personal benefit, the stockholders of the former corporation, or a part of them, may institute a suit to compel the officers to account for such mis-application; and when the stock of the first corporation in the connecting road has been fraudulently cancelled by the officers of the two corporations, and a like amount of stock in the connecting road issued, without consideration, to S. and N., as trustees for the former corporation, and such corporation is the equitable owner of the same, the stockholders of said first corporation, or a part of them, may maintain a suit to compel the officers of such connecting corporation to restore to said corporation the funds and property wrongfully taken by them, without first bringing an action to compel a transfer of the stock from S. and N. to the corporation equitably owning the same, if both of said corporations and said S. and N. are joined as defendants in the suit, and S. and N. have refused, on request, to institute a suit to protect the property and interests of the corporation equitably owning the stock in the name of S. and N. as trustees. *Id.*

263. INTERVENTION IN CORPORATE SUIT. Where a mortgage executed by the officers of a corporation has been foreclosed, an individual stockholder can not interfere, by injunction, to restrain levy and sale, under the mortgage fieri facias, without showing sufficient reason why the corporation itself is not the party complainant; *Henry et al. v. Elder, adm'r*, 7-19.

264. TO PREVENT IRREPARABLE INJURY. A stockholder in a corporation has such an interest as will entitle him to prevent the sale of the corporate property by persons who have no lawful power, or mandate, to sell; *State, ex rel. Morey, v. Judge etc.*, 7-247.

265. IRREPARABLE INJURY. An interlocutory decree ordering a sale of corporate property to be made by persons who have no lawful power to sell, may inflict irreparable injury on a sharehol-

der of a corporation. Hence, he may suspensively appeal from such decree. *Id.*

266. **IRREPARABLE INJURY.** The fact that a corporator, or shareholder, might seek recourse on the bond of the persons, acting as liquidators of the corporation, on account of any sale of the corporate property they might unlawfully make, demonstrates the right of such shareholder to appeal from the decree of court ordering the sale. *Id.*

267. **SUIT BY.** In order to enable a stockholder to sue for the corporation of which he is a member, or for his associate stockholders, where the rights of the corporation are involved, he must allege that the directors decline to sue, or refuse to permit him to sue in the name of the corporation and the corporation must be a party to the suit either as plaintiff or defendant; Shawhan etc. v. Zinn etc., 7-186.

268. **ACTION AGAINST.** The corporation is the proper and primary party to call its directors to an account, in a court of equity, for fraud or breaches of trust in the management of its affairs. To enable a shareholder, either for himself alone or for himself and others, to maintain a bill against directors, for fraud or breaches of trust in the management of the corporate affairs, he must allege and show not only the violations of duty or breach of trust on the part of the directors charged, but, as well, that he, as a stockholder, has been damnified thereby and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong. If, however, a bill be filed by stockholders and the proof shall sustain allegations made that a majority of the shares are owned by another company and that a majority of the directors are adverse to the interest of the plaintiffs, and are combined against them, and would frustrate and defeat any attempt to induce the corporation to take action for the wrongs complained of, such facts would be a sufficient excuse for not making or alleging a formal demand upon the corporation to take action; Booth et al. v. Robinson et al., 7-419.

269. **STOCKHOLDER'S SUIT AGAINST CORPORATION.** To restrain acts the principle involved in the leading case of Dodge v. Woolsey (18 Howard, 33), permits the stockholder of a corporation to step in between the corporation and a party with whom it has been dealing, and institute and control a suit in which the rights involved are the rights of the corporation and the controversy, one really between that corporation, entirely capable of asserting its own rights, and the other party who is equally capable; Hawes v. Contra Costa Water Co., 6-98.

270. —. To enable a stockholder in a corporation to sustain, in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit, (1) some action, or threatened action

of the managing board of directors, or trustees, or the corporation, which is beyond the authority conferred on them by their charter, or other source of organization; or (2) such a fraudulent transaction, completed or contemplated, by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to interests of the other shareholders; or (3) where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive to the corporation itself, or of the rights of the other shareholders; or (4) where the majority of the shareholders, themselves, are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders and which can only be restrained by the aid of a court of equity. It is possible other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers; but, the foregoing is to be regarded as an outline of the principles which govern this class of cases. *Id.*

271. STOCKHOLDER'S SUIT AGAINST CORPORATION. In addition to the existence of grievances which call for relief, before a stockholder will be permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that (1) he has exhausted all means within his reach to obtain, within the corporation itself, the redress of his grievances; (2) he has made an earnest effort with the managing body of the corporation, to induce remedial action on his part; or (3) in the event of failure with the directors, if time has permitted, that he has made an honest effort to obtain action in the matter of complaint, by the stockholders as a body; or (4) he must show a case, if this be not done, where it could not be done, or in which it would be unreasonable to require it to be done; and, (5) he must verify the fact that he was a shareholder at the time of the transaction of which he complains or that his shares have devolved on him since by operation of law, and, if the suit be instituted in a federal court; (6) that it is not a collusive one, for the purpose of conferring jurisdiction it should not take. *Id.*

See, also, ACTION; ASSESSMENT OF STOCK; CONSOLIDATION; CREDITOR'S BILL; DEBTOR AND CREDITOR; DIVIDEND; ELECTION; EQUITY; ESTOPPEL; FORFEITURE; JUDICIAL DISQUALIFICATION; LIEN; MANDAMUS; MEETING; NATIONAL BANK; ORGANIZATION; PERSONAL LIABILITY; PLEDGE; SUBSCRIPTION TO STOCK; TAXATION; TRANSFER OF STOCK.

STOLEN CERTIFICATE OF STOCK.

1. TITLE THERETO. Where the owner, of shares of stock, causes the certificate thereof to be transferred, on the books of the corporation, to another as trustee and the transferee indorses the

same, by his signature, and delivers the same to the original owner, but, afterward, steals it from such owner and sells it, to one who in good faith purchases it, in the ordinary course of business and without notice of any claim of the original owner, from the thief, takes a valid title to such stock as against such original owner; *Winter v. Belmont Mining Co.*, 6-248.

2. JURISDICTION. A court of equity will take jurisdiction of a bill which avers that certificates of stock of a corporation have been stolen, the name of the true owner forged to a power to transfer and the stock sold and transferred on the corporate books, to compel the issue of new certificates of stock and an accounting for dividends declared, or in default thereof, to compel the purchasers to replace the stock. Such a bill is not demurrable for want of equity; *Blaisdell et al. v. Bohr et al.*, 9-64; see, also, *Mach. Nat. Bk. v. Field et al.*, 7-486.

STREETS.

1. DEDICATION; ACCEPTANCE. The act of 1862, relating to the city of San Francisco, provides that "all the original streets . . . and all other streets, lanes, alleys, places or courts, now dedicated to public use, or which shall hereafter be dedicated to public use . . . are hereby declared to be open public streets" etc. Held, that a mere dedication of land to such public use, without any formal acceptance of the same by the board of supervisors, authorized the board to improve the same as a public street, lane, alley or court, although the municipal corporation would not be bound, before this was done, to keep it in a safe and passable condition for public use; *Stone v. Brooks*, 2-70.

2. CUL DE SAC. A street or court which is a mere cul de sac may be dedicated to the public use in like manner as a thoroughfare. *Id.*

3. WHAT AMOUNTS TO A DEDICATION. The owner of a tract of land caused it to be platted into lots of the size and proportion of city lots, fronting on an extension of a public street of the city through such tract. Lots were sold at public sale by said map. Held, that this was a dedication of the land embraced in the extension of the street to the public use as a street, subjecting it to the jurisdiction of the board of supervisors for purposes of its improvement. *Id.*

4. WHAT ACCEPTANCE. The improvement of a street thus dedicated by the board of supervisors operates as a complete acceptance of the dedication, and perfects the right of the public to use it as a highway for all purposes. *Id.*

5. DEDICATION; EVIDENCE. To establish a dedication of a street, the proof must be clear of an actual intent so to do, or of such acts and declarations as will equitably estop the owner from denying such intention; *Kelly v. City of Chicago*, 2-190.

6. —. During the absence of the owner from the state a roadway was opened over his land, without his knowledge, by

digging ditches on either side of such road. After his return he permitted it to be used by omitting to inclose the premises, or to institute actions of trespass against persons so using it. Held, not to be conclusive evidence of an intention to dedicate. *Id.*

7. DEDICATION; EVIDENCE. And, in such case the placing upon record, during the same year, of a formal instrument of dedication, opening a street through a portion of the same property, but stopping at that part so in use by the public, and which part had always been laid out into lots, was regarded as sufficient to rebut any presumption which might be drawn from user by the public of such roadway of an intention to dedicate. *Id.*

8. STATUTE CONSTRUED. The statute of the state of Iowa, relating to village plats, provides that the acknowledgment and recording of the plat shall be equivalent to a deed in fee simple of the portion of the land therein set apart for public use. In a village plat the streets and alleys therein marked were declared to be conveyed to the county for the use of the public. Held, that the conveyance to the county was without legal significance or effect, and that the plat and the acknowledgment thereof operated to convey the streets and alleys to the town for the use of the public; *City of Des Moines v. Hall*, 2-233.

9. ACCEPTANCE OF DEDICATION. An acceptance by a town or city of an amended charter, which includes an addition previously laid off and platted, amounts to an acceptance of such addition, and the streets and alleys therein. *Id.*

10. THE RIGHT TO MINE. After a dedication of streets and alleys to the use of the public, by acknowledging and recording a village or town plat, under the statute of Iowa, the grantor has no right to mine coal from such streets and alleys, and an action to restrain the same may be maintained by the corporation. *Id.*

11. OPENING STREET; NOTICE. A. acquired land in a city where proceedings were in progress before the mayor and aldermen to open a way over it. B., who was A.'s "full agent with respect to" the land, was fully informed concerning the proceedings, and as owner in his own right of another lot of land on the same street, was served with written notices, as provided by the statute. The mayor and aldermen, no one of them knowing that A. had become owner of the land, adopted an order laying out the way. It was held that A. having neither formal nor actual notice of the proceedings, was no ground for certiorari to quash the same; *Pickford v. Mayor and aldermen of Lynn*, 2-453.

12. CONCURRENT ACTION. Under a statute of Massachusetts which provided that the mayor and aldermen of a city, "with the concurrent vote of the common council, shall have exclusive authority and power to lay out any street," if, in concurring with the mayor and aldermen for laying out a street, the common council propose amendments to the order in matters incidental to and not modifying the location, with which amendments the

mayor and aldermen agree, it is no ground for certiorari to quash the proceedings. *Id.*

13. WHO MAY OBJECT. The statute of Massachusetts of 1862 gives no right to avoid the laying out of a way by a city or town to any person, except the owner of the land over which it is located, whose damages remain unpaid and untendered for two years after the date of such location. *Id.*

14. APPROPRIATION TO USE OF RAILROAD. When the fee of the streets in a city are vested in the corporation, in trust for the public, their use in the construction and operation of a railroad may be authorized by the legislature without the consent of the city and without compensation; *City of Clinton v. Cedar Rapids & Missouri R. R. Co.*, 2-253.

15. NOT PRIVATE PROPERTY. The streets of a city are not the private property of a corporation in such sense as to necessarily entitle it to compensation for an additional public use, the same as a private proprietor holding the fee. *Id.*

16. RULE APPLIED. Legislative authority to build a railroad from the city of Lyons to a point of intersection with the Chicago, Iowa and Nebraska railroad, within the corporate limits of the city of Clinton, conferred upon the railroad company all requisite power to use so much of the streets of the city of Clinton as was necessary in the construction of said road as designated, without the consent of the city, and without awarding it compensation. It appearing that the railroad company had, in the selection of its route within the city, duly respected the grades of streets, and avoided the use of them so far as practicable, an injunction, restraining the company from constructing its road on the streets within the city, was dissolved. *Id.*

17. RIGHT OF WAY. It was held, per WRIGHT and BECK, that the same result was reached under the general right of way act. *Id.*

18. —. And by COLE, that while the right to thus use the streets exists, the city has such an interest therein as to be entitled to compensation for any damages resulting from such occupation. *Id.*

19. WHO LIABLE FOR ASSESSMENTS. In Louisiana a widow who owns one-half of the property of her deceased husband in community, and has a usufructory right over the other half, is personally liable for assessments made for the improvement of the streets on which it fronts; and an action may be maintained against her therefor in any court of competent jurisdiction; *City of New Orleans etc. v. Wise*, 2-379.

20. DAMAGES TO PROPERTY OWNER. When a contractor, in laying a pavement in the banquette in one of the streets of the city of New Orleans, destroys or takes up shade trees which have been planted there, he is liable in damages to the owner of the property. *Id.*

21. **VACATION OF.** A municipal corporation, under the authority conferred by its charter, to "locate and establish streets and alleys and vacate the same," may rightfully and constitutionally order the vacation of a street; and, when this power is discreetly exercised and with due regard to private rights, will not be restrained at the instance of a citizen claiming that, as a land owner, he is interested in keeping open the streets dedicated to the public; *Gray v. Iowa Land Co.*, 2-310.

22. **CONSTRUCTION OF SIDEWALK.** A statute of Massachusetts provided that if the owner of land abutting on a street in a city shall neglect to build against his lot, to the acceptance of the mayor and aldermen, "a sidewalk," with brick or flat stone, supported on the outer edge with edge stone, within thirty days after notice from the city so to do, the city may construct "the same" at his expense. It was held that such an abutter was not liable for such a sidewalk built against his lot by the city, if the notice with which he neglected to comply did not indicate the dimensions of the sidewalk which the city required him to build; and it is immaterial that the city council had given to a committee authority to set the edge stones at the expense of the city, if the notice to the abutter did not inform him who would set them, nor when nor where they would be set; *Tufts v. City of Charlestown*, 2-469.

23. **POWER TO REMOVE AWNINGS.** The statute of Massachusetts, which authorizes the surveyors of highways in towns to "dig up and remove whatever obstructs or incumbers a highway or town-way, or hinders, incommodes or endangers persons traveling thereon," empowers them to remove an awning projecting over a sidewalk; *Heald v. Lang*, 2-467.

24. **DECISION FINAL.** The decision of such surveyors is final, and will not be reviewed by the court. *Id.*

25. **AUTHORITY TO IMPROVE.** The charter of the city of Covington conferred upon the city council "full power and authority to procure all the streets, alleys, market spaces and lanes in said city to be improved, re-improved or repaired, in whole or in part, in any manner they may deem advisable, at the expense and cost of the owners of the property fronting the same, . . . and to do, or cause to be done, either, any or all of said kinds of improvements with bowlders or any other sort of stone, at the expense and cost of the owners fronting on such streets, alleys, market spaces, public squares, or ground or lanes. And a petition in writing to the said council of the owners of the larger part of the ground between the points to be improved, . . . shall be sufficient to authorize the said council to contract for either, any or all of the above mentioned kinds of improvement. . . . Provided, further, that the said council, by a vote of all the members elect, may cause any street etc. to be improved as aforesaid, at the cost and expense of the owners . . . without petition or consent." Held, (1) that to authorize the apportionment of the expense of im-

proving a street upon the lots fronting such street and establish a lien therefor, the ordinance directing the work to be done must have been enacted upon such a petition or by the unanimous vote of all the members elect of the council; (2) that for work done by order of the council, without such petition or vote, the corporation is liable; *City of Covington et al. v. Casey et al.*, 2-338.

26. RE-LETTING CONTRACTS. When it becomes necessary to re-let a contract for the improvement of a street in San Francisco, because of the failure of the first contractor to perform the work, the same course must be pursued as to advertising and opening bids as in the first instance; *Meuser v. Risdon et al.*, 2-101.

27. —; DEMAND. When more than one person, either by original contract or by assignment, is interested in a contract for the improvement of a street in San Francisco, the demand required by statute for the payment of the assessment before the lot can be charged with a lien for the same, may be made by one of the parties so interested; *Gaffney v. Gough*, 2-100.

28. LIEN; PERSONAL JUDGMENT. An assessment for the improvement of a street may be charged as a lien on the lot in front of which it is made; but a personal judgment can not be rendered against the owner of the lot. *Id.*

29. OCCUPANCY BY CITY. An ordinance by the city of St. Louis provided that "whenever the city of St. Louis, as the owner or occupant of property, shall become charged with the cost of any work done," under the provisions of an ordinance referred to, "the auditor shall pay the same and charge it to appropriations for streets and alleys." Held, that setting apart a portion of a certain street, by ordinance, as a stand for market wagons during certain hours of the day, did not render the city an "occupant" within the meaning of the first mentioned ordinance; *Bixler v. Hagan et al.*, 2-585.

30. REMEDY; REPEAL. The repeal of a law under which an improvement in a street has been made, after the work has been done, and a precept ordering a sale of the property has been issued, does not take away the remedy of the contractor. His claim is merged unto what is equivalent to a judgment and execution levied upon the property, and is a vested right which can not be taken from him; *Palmer v. Stumph*, 2-216.

31. CONTROL. Municipal corporations may have control of streets for certain purposes, but unless it is specially granted, they can not, as against a private corporation having a charter from the same legislative power, with permission to lay gas mains in the streets, prohibit the laying of such mains, there being no condition in the charter of the latter requiring it to obtain permission from the municipality; *City of Atlanta v. Gate City Gas Light Co.*, 10-150.

SUBSCRIPTION FOR STOCK.

1. CAPITAL STOCK. Subscriptions make up the capital stock of corporations and constitute a trust fund for the security of the creditors of the company; *Lamar Ins. Co. v. Moore*, **6-390**.

2. TRUST FUND. Unpaid subscriptions constitute a trust fund for the benefit of creditors; and the subscriber can not be released from his obligation to pay, by any agreement or arrangement with stockholders, to the prejudice of creditors; *Moss v. King*, **6-514**.

3. —. Unpaid subscriptions are a trust fund for the payment of the debts of the corporation. Where a corporation has ceased to exist a court of equity will take jurisdiction and compel their payment; *Patterson v. Lynde*, **10-239**.

4. PRESUMPTION. Subscribers for stock must be presumed to know the law of the state and to contract in view of it; *Nugent v. Supervisors*, **5-52**.

5. —. The presumption is, that each subscriber, for stock, knows at the time of subscription, the contents of the company's charter; *M'Carthy v. Lavasche*, **6-419**.

6. —. A subscription to stock must be regarded as having been made, with reference to the powers granted the company; *Ottawa, Oswego Fox Riv. Val. R.R. Co. v. Black et al.*, **6-359**.

7. PARTICULAR FORM NOT REQUISITE. It matters not how informal the writing may be, if the intent of the parties can be collected from it. If the parties intended to adopt articles of incorporation and become subscribers to the stock, thereunder, they are under obligation to pay according to the contract made by such articles; this without any promise to pay in so many words; *Milton v. Clayton*, **6-569**.

8. SUBSCRIPTION; HOW MADE. When the charter of the company defines the terms of subscription for stock, it is only necessary that the writing, signed by subscribers, should show an intention to become stockholders and the number of shares subscribed for; *Gill's administratrix v. Kentucky & Colorado Gold and Silver Mining Co.*, **3-346**.

9. SUFFICIENT. A subscription in the articles of association, with a statement of the number of shares taken placed opposite it, is a sufficient subscription and takes effect simultaneously with the filing of the certificate; *Phoenix Warehouse Co. v. Badger*, **5-588**.

10. MANNER OF MAKING. Subscriptions to the capital stock of a corporation were made on a loose sheet of paper, which was deposited in a bound book, used as a record of the company. The contents of the paper, with the names of the subscribers and the amounts subscribed, were entered in the book, by the commissioners appointed to open books of subscription. This was a sufficient subscription to the stock; *Woodruff v. M'Donald et al.*, **6-193**.

11. **SUBSCRIPTION INSTANCED.** A promise to pay a sum of money, certain, to a corporation — in this case a railroad company — when a certain amount of the work of construction is done, with an agreement, on the part of the company, to deliver to the party, on payment of the money in full, upon demand, a certificate for a like amount of its capital stock, is a subscription to stock and not a purchase thereof; *Ottawa, Oswego & Fox Riv. Val. R.R. Co. v. Black et al.*, 6-359.

12. —. A statement read: "We, the undersigned, having associated ourselves together, for the purpose of organizing a banking association and transacting the business of banking, under chapter 52 of the revision of 1860, do declare and state as follows: Third, the name and residence of the shareholders of this association, with the number of shares held by each, are as follows," and the association became incorporated. It was held this was a subscription to stock, on the part of signers, and that, as stockholders, each one was bound to pay for the number of shares set opposite his name, in the manner prescribed by the articles; *Milton v. Clayton*, 6-569.

13. —. An act of assembly of Pennsylvania authorized a county of that state to subscribe for stock in a railroad company and to pay for the same in bonds of the county, bearing interest at the rate of six per cent. per annum. The railroad company, on its part, was empowered to receive such bonds in payment of its stock, and, by another act, to pay to the shareholders entitled to receive the same, interest at the rate of six per cent. per annum on all instalments paid by them, which interest shall be charged to the cost of construction, and continue to pay the same until the road shall be completed." The company accepted the terms as to the county and stipulated to pay interest "semi-annually . . . by applying the same to the semi-annual interest coming due on the bonds so issued by the county aforesaid" during the life time of the bonds, viz.: thirty years. Held, (1) in the absence of express authority from the legislature the contract would be ultra vires; (2) the provision of the authorizing act applied to all stockholders, otherwise, it authorized a fraud on shareholders who paid their money but did not receive interest; (3) the stipulation to pay interest during thirty years was in excess of the power of the company. Its authority to pay such interest ceased when the road, authorized by its original act of incorporation, was completed, that being the only undertaking enforceable against the company by the commonwealth; *Pittsburg & Connellsville R.R. Co. v. County of Allegheny*, 4-92.

14. **PREFERRED STOCK.** A subscription to stock, in the following words and figures, to wit: "We, the undersigned, do, hereby, subscribe to the preferred capital stock of the St. Paul, Stillwater and Taylor's Falls Railroad Company, and promise to pay for the number of shares set opposite our respective names; these sub-

scriptions not to be binding until sixty-five thousand dollars of said stock is subscribed for. Date: October, 1872; name of subscriber, Daniel M. Robbins; No. of shares, 20; par value, \$2,000," taken in the stock subscription book of the company, authorized by it to be opened to receive such subscriptions and the issuance of such preferred stock having been duly authorized by it, constitutes — the \$65,000 having been subscribed for — a valid contract, on the part of the company, to issue the stock and, on the part of subscribers, to receive and pay for the stock; *St. Paul, S. & T. F. R.R. Co. v. Robbins*, 7-614.

15. EFFECT OF SUBSCRIPTION. The taking of stock in a corporation creates a contract, express or implied, to pay for it, in the mode prescribed by the charter; *Gill's adm'r v. Ky. & Col. M. Co.*, 3-346.

16. IMPLIED PROMISE OF SUBSCRIBER. A promise to take shares of stock imports a promise to pay for them; *Upton, assignee, v. Tribilcock*, 5-111.

17. OBLIGATION OF SUBSCRIBER. The obligation of actual payment is created, in all cases, by a subscription to a capital stock, unless the terms of the subscription are such as plainly to exclude it; *Busey v. Hooper et al.*, 4-430.

18. CONSIDERATION. A subscription for stock is a contract, and must be supported by a consideration. The consideration is the right secured by it, of membership and the interests accruing therefrom. When these can not legally result from the subscription, it is wanting in consideration, as are all notes or other obligations for its payment; *Grangers Life & Health Ins. Co. v. Kamper*, 10-21.

19. —. Mutual subscriptions for a common object where money had been expended in the accomplishment of that object are binding, and such subscriptions constitute a valid contract; *Whitsitt v. Trustees etc.*, 10-223.

20. —; HOW ENFORCED. A subscription made in anticipation of the formation of a corporation, if the corporation is afterward formed, is binding, and payment of such subscription is enforceable in the name of the corporate body. *Id.*

21. —. Where a person, for the purpose of aiding in the erection of a building for religious worship, and to form a church society at a certain place, circulated a subscription paper for the purpose of obtaining the necessary funds, payable to himself, in which he subscribed \$1,000, collected the subscription and built the church mainly from such subscription, he paying in additional means of his own to complete the same and for repairs, afterward, stated to the church officials that the church was all paid for, held, that what he expended in building and repairing the church, in addition to his formal subscription, should be regarded as a gratuity. *Id.*

22. **WHAT IS BINDING.** A subscription to the articles of incorporation, with a statement of the number of shares opposite the name, is a sufficient and binding subscription for the stock and takes effect upon the filing of the certificate; *Phoenix Warehousing Co. v. Badger*, 8-476.

23. —. Where a subscriber promises, without any conditions, to take and pay for a certain number of shares of stock at their par value, such promise is binding, notwithstanding the amount of the capital stock was not fixed, and the minimum number of shares named in the charter were not subscribed; *Skowhegan etc. R.R. Co. v. Kinsman*, 10-531.

24. **NATURE OF SUBSCRIPTION.** A subscription to stock is a contract between the subscriber and the company, governed by the same rules of honesty and fairness, in its enforcement, that apply to ordinary contracts; *Custar v. Titusville Gas & Water Co.*, 4-101.

25. **CONTRACT OF STOCKHOLDER.** By becoming a stockholder in a corporation, the subscriber contracts that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further. Any attempt to use the funds, or pledge the credit of the company, not within the legitimate scope of the charter, is a violation of the contract which the stockholders have made with each other and of the contract rights of the unwilling stockholder; *Central R.R. Co. et al. v. Collins et al.*, 3-224.

26. **LIABILITY ON SUBSCRIPTION.** A stockholder is not relieved of this liability by paying in the amount subscribed by him, but it is the interest of each stockholder to see that the whole amount of the capital is paid in and a certificate of the fact made and recorded, as provided by statute, and until this is done, each stockholder is liable, to the amount of his stock, for the debts of the company; *Butler v. Walker*, 5-333.

27. **EFFECT OF SUBSCRIPTION.** The mere fact of subscribing to the stock of an incorporated company does not constitute the subscriber a stockholder. Such subscription puts it in his power to become a stockholder, by compelling the corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription; *Busey et al. v. Hooper et al.*, 4-430.

28. **STOCK SUBSCRIPTION BY REALTY.** Previous to the passage of the general railroad act of February 11, 1848, of Ohio, a railroad company was chartered by a special act of the legislature, empowering the directors to transact all the business of the company, but did not expressly authorize subscriptions to the capital stock in real estate. This privilege was conferred by the 14th section of the act of 1848, upon all railroad corporations then existing that might accept the power so conferred. After the passage of that act, the directors entered on the records of the company a

resolution that subscriptions to the capital stock might be made in real estate. The company then received real estate subscriptions to its stock, and sold and conveyed the same to bona fide purchasers, with the knowledge of such subscribers and without objection on their part, until many years after, when the stock had become worthless, and the enterprise for which the company was organized had been abandoned. Held, that, in a suit by a subscriber against a vendee of the company, to recover back the land conveyed by him to the company on such subscription, proof of the exercise of the privileges conferred in the 14th section of the act of 1848, by the company, under a resolution of the directors, and with the acquiescence of the parties to the suit, was sufficient evidence, as between them, of the acceptance of the powers conferred in that section, and that the company was thereby authorized to take and convey land received on subscription to its capital stock; *Goodin v. Evans et al.*, **3**-645.

29. **INVALID.** An instrument in writing by which the subscribers thereto, "mutually agree to purchase and take of the original proprietors," each a certain number of shares of stock of a corporation and to pay a certain price therefor, and in which is expressed, as a condition of the subscription, that a specified number of shares of the capital stock "shall be paid to trustees, to be held by them for the benefit of and subject to the direction of the company," can not be enforced against subscribers, thereto, for want of a valid consideration, where it is not alleged that any thing was done or promised, or that any liability was assumed by any person on account of or relying on the signing or agreement of such subscribers. The fact that others signed the paper, under such circumstances, does not constitute any consideration. The placing of its own stock, by the company, in the hands of trustees, to be held for its benefit and subject to its direction, is not such a benefit to the subscribers, nor such an injury, inconvenience or detriment to the company, as the law considers a sufficient consideration for such an agreement; *New York & Minnesota Gold Mining Co. v. Martin et al.*, **3**-499.

30. **FRAUD IN.** Where a person signs his name to the subscription list of a proposed corporation, in the list of subscribers to the stock, but does not carry out any amount of subscription, but, to that extent, leaves a blank, the object would seem to be to enable the promoters of the organization to represent him as a subscriber when he is not, and this is a palpable fraud. Any artifice, or trick, tending to mislead a subscriber, in this respect, is a moral wrong and a legal fraud. Wherefore, if a person shall have so signed, it will be held that, as to creditors of the company, he, thereby, implicitly authorized those empowered to take subscriptions to fill up the blanks and is estopped from questioning their authority so to do; *Jewell et al. v. Rock River Paper Co. et al.*, **9**-71.

31. **WITHDRAWAL OF SUBSCRIPTION.** A person subscribing before the organization of a corporation raises a mutuality in his contract which will render him liable to the company after incorporation. A subscriber to an agreement to take measures to carry out the incorporation, can not discharge himself of liability or repudiate the concern to which he may have thus pledged himself, nor can he be released from his subscription without the consent of all the co-subscribers; *Hughes v. Antietam Manuf. Co. etc.*, **3-377**.

32. **MEMBERSHIP OF SUBSCRIBER.** When a corporation has been created, according to law, the incorporated associates who hold the corporate franchise are members of the corporation; and a subscriber for shares, although he has received no certificate of stock, or the stock has not even been divided into shares, is a member of the corporation and a stockholder within the meaning of the statute of Massachusetts making the stockholders of the corporation personally liable for its debts; *Harris v. Anglo Saxon Petroleum Co.*, **3-408**.

33. **SUBSCRIBER NOT A STOCKHOLDER WHEN.** A subscriber to the capital stock who never paid any thing for the stock and suffered forfeiture for non payment, can not be regarded as a stockholder in any such sense as to permit him to object to any disposition the court may make of the assets of the corporation; *St. L. & Sand. Coal Co. v. Sand. Coal Co.*, **10-292**.

34. —; **DELIVERY.** Defendant, being the president of a corporation, had, with others, signed a paper agreeing to take certain shares of stock; retained the paper in his possession, but it was produced at corporate meetings, and was at some times in the possession of the secretary. It was held that such retention by him, he being the chief officer of the company, did not tend to show he had not become a stockholder as against a creditor of the corporation; *Corwith et al. v. Calver*, **5-244**.

35. **IMPLIED PROMISE.** Whether or not there is any express promise to pay for stock, at the time of subscription, the law implies such promise, by the acceptance of such stock, on the part of the holder; *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co. et al.*, **6-481**.

36. **LIABILITY UPON.** Upon subscribing each party becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of subscription; *Hatch v. Dana*, **6-63**.

37. —. A subscription agreeing and binding subscribers to take the amount of shares set opposite subscriber's name, imports no promise, on his part, to pay for them directly. He can be held for their price, in such case, only under the contract taken in connection with the charter; *Belfast & M. L. R.R. Co. v. Cottrell*, **7-276**.

38. **PROMISE TO PAY.** Where the stock of a corporation is defined in its charter or articles of association, and is divided into shares of a definite amount in money, a subscription for shares is equivalent to a promise to pay therefor, as it is lawfully called for, to the amount of the face value of the shares. The subscription inures to the benefit of the corporation when its organization is perfected; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

39. —. The original holder of stock in a corporation is liable for unpaid assessments thereon, without an express promise to pay them. Any contract between the corporation, or its agents, and the stockholder, limiting his liability therefor is void as to creditors of the company and therefore, as to the assignee of a company in bankruptcy; *Upton, assignee, v. Tribilcock, and Webster v. Upton, assignee*, 5-111, 120.

40. **NOT TO BE QUALIFIED BY AGREEMENTS OF SUBSCRIBERS.** The legal effect of subscriptions to the capital stock of a private joint stock company, which are absolute and unconditional on their face, can not be qualified or limited by any general understanding among the subscribers that the same should be abandoned and not collected unless a given amount was subscribed, as against creditors of the company, for debts incurred after a permanent organization of the corporation, by the election of directors, and engaging in the enterprise contemplated by the charter and organization; *Hickling v. Wilson et al.*, 9-177.

41. **SECRET AGREEMENT.** A secret agreement made with a subscriber to the stock of a corporation, that he shall pay only a part of his subscription, is fraudulent as to the other subscribers, and void, and the subscription will be regarded as valid for the amount subscribed; *Galena & S. W. R.R. Co. v. Ennor*, 10-285.

42. **PRIVATE CONDITIONS.** Creditors of a corporation can not be affected by mere private understandings between the subscriber and the subscription agent of the company, by which the former is sought to be exonerated from the performance of that which his subscription, in terms, requires; *Jewell et al. v. Rock River Paper Co. et al.*, 9-71.

43. —. That the promoter of a corporation should enter into private agreements with some of the subscribers to its stock, which are inconsistent with the contract of subscription actually signed, is not to be tolerated in the law; all such agreements are inoperative and void as to other subscribers to the stock and creditors dealing with the company on the faith of its capital subscribed. *Id.*

44. —. Representations, by an agent of a corporation, as to the non assessability of its stock beyond a certain fixed per centage of its value, constitute no defense to an action, against the holder of the stock, to enforce payment of the entire amount subscribed, where the subscriber has failed to use diligence to ascertain the

truth or falsity of such representations; Upton, assignee, *v.* Tribilcock, **5**-111.

45. **AGENCY IN SUBSCRIPTION.** Where one has subscribed for stock as the agent of another, and such subscription has been accepted, by the corporation in good faith; and, the company has become duly incorporated and organized and, relying upon such subscription, has incurred liabilities etc., the parties subscribing will be personally liable to the corporation should it appear the subscription was without authority of the party named as principal; *Baile v. Calvert College Educat'l So.*, **7**-379.

46. —. The owners of undivided interests in property having agreed, among themselves, to form, immediately, a special partnership for the purpose of improving the same until a charter could be procured and an organization perfected under the same, when the property was to be transferred to the corporation so formed and each owner to take stock in proportion in the property thus to be conveyed, it was held that, upon the formation of the corporation, as contemplated, and the conveyance of the legal title to it, the secretary of the association was authorized to subscribe the name of the owner, of an interest, to the stock of such corporation when it was organized; *Marseilles Land & Water Power Co. v. Aldrich*, **6**-406.

47. **MODE OF SUBSCRIPTION.** A meeting was held in the township in which defendant lived, at which he was present. It was held for the purpose of procuring subscriptions to the stock of the plaintiff company. The objects of the subscription and its terms and conditions were fully made known and those present were solicited to subscribe. The names of subscribers and the amount of their subscriptions were written down in a small book, or on slips of paper, by the parties soliciting, they being authorized so to do by the subscribers. Afterward these subscriptions were transcribed by an officer of the company into a proper book, under authority conferred at the meeting. It was held that the book became original evidence of subscription and that a subscription so made was binding; *Iowa & Minnesota R.R. Co. v. Perkins*, **3**-320.

48. **MARRIED WOMEN.** Even if, in Illinois, a married woman can enter into a contract so as to be bound as a member of an association for business purposes, yet her husband can not, without authority from her, make a binding contract for her by signing her name to articles of association; *Boyd v. Merriell*, **3**-260.

49. **PRIOR TO INCORPORATION.** A subscription for shares of stock made prior to the organization of the corporation to be promoted is inchoate and incomplete until organization complete or a mutual agent constituted to represent the association of individuals; *Athol Music Hall Co. v. Carey*, **7**-441.

50. **AGREEMENT TO SUBSCRIBE.** An agreement, or written promise to subscribe for stock, in the future, upon the happening of an

event, as the organization of a corporation is not a subscription to stock ; *Mount Sterling Coal Road Co. v. Little*, 7-181.

51. **SUBSCRIPTION BEFORE LICENSE.** An executory agreement to take stock in a manufacturing company made before necessary license is issued is not a subscription to stock ; *Stowe v. Flagg et al.*, 5-292.

52. —. Subscriptions can not be taken (in the state of Michigan) or if taken create no obligation, until by-laws, directing the manner of subscribing, have been adopted, if the charter provides that the persons subscribing the original articles and those who subscribe to the stock in a manner to be provided by the by-laws, shall be a body corporate ; *Carlisle v. Saginaw Valley & St. Louis R.R. Co.*, 5-456.

53. **AS BETWEEN INDIVIDUALS.** The promise of each subscriber, "to and with each other," in an agreement entered into before organization of a corporation is formed, is not a contract capable of being enforced or intended to operate literally as a contract to be enforced between each subscriber, present or future ; *Athol Music Hall v. Carey*, 7-441.

54. **ON ARTICLES OF ASSOCIATION.** A subscription for shares made, upon articles of association, in contemplation of being incorporated under a general incorporation law, is binding, and may be enforced after the organization of the company ; *Hughes v. Antietam Manufacturing Co. etc.*, 3-377.

55. **BEFORE ORGANIZATION.** Where persons have signed an agreement to take and pay for a number of shares, set opposite their respective names, of the capital stock of a corporation to be thereafter organized under the provisions of a general law authorizing the incorporation for the purpose of carrying on a manufacturing business, on conditions therein specified, such agreement is binding on the subscribers ; *Ashuelot Boot & Shoe Co. v. Hoit*, 8-383.

56. —. Where several persons jointly undertake to subscribe to the capital stock of a corporation to be organized for the prosecution of a common enterprise, which has for its object the advancement of the interests of the several subscribers, the promise by each is a good consideration for the promise of others ; and, it is too late, after the act of incorporation takes place, to withdraw from the association, whether the work contemplated has, or has not, been undertaken ; *Twin Creek etc. Turnpike Road Co. v. Lancaster*, 7-189 ; *Same v. Rennekar*, 7-189.

57. —. A contract to subscribe for stock of a corporation to be brought into existence in the future, does not estop the maker thereof to deny the existence of the corporation ; *Rikhoff et al. v. Brown's Rotary Sewing Machine Co.*, 7-100.

58. —. A written agreement to take and secure a certain number of shares in a corporation, before the organization of such corporation, is an offer, or proposal, to take that number of shares

and subscribers are not thereby constituted stockholders in the corporation upon its organization. Without accepting the proposal so made the company is powerless to compel the subscriber to take the stock; and, the subscriber can not compel the issue, to him, of a certificate of stock save upon tender of payment, or security therefor; *Starrett v. Rockland Fire & Mar. Ins. Co.*, 7-271.

59. ACCEPTANCE OF PROPOSAL TO TAKE STOCK. By the preparation of a list of amount of stock taken and secured, in a corporation, containing the name of a subscriber who signed prior to organization, entering that list in the stock ledger of the company, and by returning such list as required by law, the company recognizes and holds out such subscriber to the world as a stockholder and, thereby, accepts his proposal to take stock. Otherwise, if it appears that these acts were done under mistake of fact. *Id.*

60. —. Pending the statutory proceedings for the incorporation of the plaintiff company, defendants, with others, signed and executed a written instrument, in terms as follows: We, the subscribers, each for himself and not for the others, do, hereby, subscribe and agree to pay for the number of shares of the capital stock of the corporation known as the Red Wing Hotel Company, set opposite our respective names, said shares to be . . . paid for at such times and in such amounts as the board of directors of said corporation may, from time to time, require; . . . provided, nevertheless, and our subscription is expressly upon the condition that the hotel to be built by said corporation shall be by it built and located upon . . . block 44 in Red Wing, otherwise this instrument to be and remain void. Upon the completion of its organization, this instrument and the subscriptions it contained were reported to the company and accepted by it, at the first meeting of its board of directors. Held, (1) that defendants' subscription took effect, as an agreement with the company, at the time of its acceptance by the latter; (2) that defendants then became obligated to take the number of shares so subscribed for by them and to pay therefor in such instalments and at such times as the board of directors might duly require; (3) that the building of the hotel was not a condition precedent to the right of the company to assess the stock and collect the assessment; *Red Wing Hotel Co. v. Friedrich et al.*, 8-1.

61. —. Defendant, with others, subscribed an instrument, written in a pocket memorandum book, which stated that "in consideration and for the purpose of becoming stockholders in" the Buffalo and Jamestown Railroad Company, they "do hereby subscribe and take the number of shares . . . of the capital stock of said company set opposite their respective names"; and they agreed to pay therefor "as required by said company." At that time the company was not organized. Subsequently, articles of association were filed and plaintiff was organized, under the

general railroad act (Laws of 1850, ch. 140). Defendant was not named in the articles, as one of the corporators. After the organization of plaintiff, defendant's name was entered as a stockholder on its stock ledger. Calls were made of instalments upon its stock, of which notice was given to defendant, and, in response, he paid two instalments, of ten per cent. each. In an action to recover the other instalments called for, the court held there was a substantial compliance with the provision of the act, quoted *infra* (§ 4), in reference to subscriptions for stock, wherefore defendant was liable; and it seems that it was not intended, by such provision, to prescribe a fixed statutory mode of making a subscription, and, that any contract of subscription, good and valid at common law, is valid notwithstanding it; *Buffalo & Jamestown R.R. Co. v. Gifford*, 9-605.

62. ACCEPTANCE OF PROPOSAL TO TAKE STOCK. Where there is an agreement to take shares of the stock of a corporation to be formed and such corporation is, in fact, organized, the corresponding agreements of other subscribers, the organization of the company and the allotment to the promisor of the shares for which he has subscribed, furnish sufficient consideration for his promise to take and pay for shares; *Athol Music Hall Co. v. Carey*, 7-441.

63. —. When the organization of an intended corporation is completed, the contract of persons subscribing for shares of its stock will be construed to have legal effect according to its purpose and intent. *Id.*

64. —. Where an agreement of association contemplates the organization of a corporation and refers the payment of subscription for stock to the proper officers of such corporation when organized, the company is constituted payee and promisee under the agreement. *Id.*

65. DEFECTIVE ACCEPTANCE. A number of persons signed a paper purporting to be an agreement to take shares of the working stock of a corporation, which, the paper recited, was about to be formed. Subsequently the signatures of the president and secretary, and common seal of a corporation of the name used in the paper were added. Action was brought to recover from one of the subscribers the amount named as his subscription in the paper. The complaint did not show the date of the company's incorporation. It was not shown that either of the subscribers joined in the organization or incorporation of the company, or was a member thereof, or that it owned any of its stock. The plaintiff corporation could not recover; *California Sugar Manuf. Co. v. Schafer*, 6-271.

66. —. If the paper above described were signed after the incorporation of the company was effected, still, the corporation had no power to treat one subscriber differently from another; wherefore, as this was not an action to recover on an assessment of stock lawfully made, there could be no recovery. *Id.*

67. **CONDITIONAL SUBSCRIPTION.** The condition upon which a subscription to stock is made, if it be lawful, must be fully complied with to authorize an assessment; *Ticonic Water Power & Manuf. Co. v. Lang et al.*, **5-414**.

68. —. It is not within the power of a corporation to make any agreement with a subscriber to its capital stock, in regard to his subscription, in violation of its charter; *Baile v. Calvert College Educat'l So.*, **7-379**.

69. —. A subscription to stock of a corporation upon conditions not expressed in the writing, is a fraud upon the other subscribers, and the subscription should be enforced without regard to it; *Corwith et al. v. Culver*, **5-244**.

70. —. Where one subscribes for stock, the corporation to be organized when subscriptions to a certain amount named are secured, this is a binding stipulation. An organization being completed in advance of that event happening the subscriber is released, at his option, from proceeding further in the business; *Santa Cruz R.R. Co. v. Schwartz*, **6-243**.

71. —. Where a subscription is made to the capital stock of a corporation — in this case an insurance company — upon the condition that the amount thereof unpaid shall not be payable until a certain specified amount has been subscribed, such condition is a condition precedent, performance of which is essential before the company can enforce the payment of a note given for such subscription; *M'Cann v. American Central Ins. Co. of St. Louis*, **8-303**.

72. —. A subscription to take a certain part of the first mortgage bonds of a railway company, which contains a clause that it is not to be binding unless 100 of such bonds are subscribed for, is not binding until 100 of the bonds are so subscribed; *Galena & S. W. R.R. Co. v. Ennor*, **10-285**.

73. —. A subscription to be paid for when the track of the road shall be graded to a point within five miles of a village named, such subscription to be in force only until September 20, 1879, can not be enforced without performance of the condition before the date named. *Id.*

74. —. One subscribed to an agreement, to take the amount of shares set against his name in the capital stock of a railroad company, agreeably to foregoing conditions; one condition was no assessment, except for preliminary survey and location, should be made nor any work upon the road commenced until the full amount was secured for the completion of the road to a given point. The subscriptions were less than the actual cost. There could be no recovery; *Belfast & M. L. R.R. Co. v. Cottrell*, **7-276**.

75. —. Where subscribers to the capital stock of a company, which they sought to incorporate, agreed that their subscriptions should be subject to a call of ten per cent. so soon as the corporation should be organized, their undertaking was some thing more

than an agreement to subscribe. It was, in fact, a subscription, subject to no other condition than that the company should be organized. So soon as that was completed and the call made it was the duty of subscribers to pay; *Twin Creek etc. Turnpike Road Co. v. Lancaster*, 7-189; *Same v. Rennekar*, 7-189.

76. VIOLATION OF AGREEMENT. If a special agreement by which stock subscribed for was to be treated and registered as fully paid up, is to be rejected in a suit by the corporation to recover upon the original subscription, the law will supply, by intendment, no special terms by which the ordinary legal duties of the party claiming the benefit of the contract, will be dispensed with; *Granite Roofing Co. v. Michael*, 7-407.

77. WAIVER OF CONDITION. In an action by the receiver of an incorporated company, against a stockholder thereof, to recover the amount due upon his subscription to the capital stock, it is too late for the stockholder to deny his liability on the ground that the whole capital stock was not taken, it appearing that he was and continued to be a stockholder during several years — in this case three — that he had regularly paid his dues and received his proportion of the profits earned by the company, and had given power of attorney to another to vote his shares at all meetings; *Musgrave v. Morrison et al.*, receivers etc., 7-411.

78. —. In such a case actual knowledge of the fact that but part of the stock had been subscribed was neither necessary to prove a waiver or an estoppel. *Id.*

79. PAROL EVIDENCE TO VARY. Where a subscription to the capital stock of a corporation is absolute on its face, parol evidence is inadmissible to explain it—as to show it was conditional; *Corwith et al. v. Culver*, 5-244.

80. CALLS. Where, by the terms of subscription to capital stock, it is to be paid in instalments within twenty days after call by the proper authorities, a subscriber is entitled to twenty days' notice of each call before he can be sued for the instalment due under such call; *Cole v. Joliet Opera House Co.*, 6-357.

81. CONDITIONAL. Where a subscriber to stock of a corporation subscribes, engaging to pay the amount which, at time of subscription, is left unpaid "on the call of the directors, as they may be instructed by the majority of the stockholders represented at any regular meeting," in an action, brought by the corporation, to recover the amount of such unpaid balance, before a recovery can be had, it must be shown the required call was made; *Lamar Ins. Co. v. Moore*, 6-390.

82. PRELIMINARY PAYMENTS. A payment of a certain proportion of the capital stock of a corporation subscribed for, required, by law, to be made "in cash," is sufficiently made, if made, in good faith, by checks drawn by the subscriber, payable in present and drawn against a sufficient sum, on deposit, to meet them; *People etc. v. Stockton etc. R.R. Co.*, 5-142.

83. PAYMENT OF PER CENTAGE ON. Where the charter of a corporation does not require the payment of a certain amount at the time of subscription made, but the agreement of subscription does, the failure to make such payment does not vitiate the subscription; *Water Valley Manuf. Co. v. Searman*, 8-32.

84. PAYMENT NOT IN MONEY. Transactions under statutes, authorizing corporations to purchase property and issue stock in payment for it, or to accept property in payment of subscriptions to capital stock, are upheld only where the agreement to purchase property and pay for it in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair bona fide valuation; *Wetherbee v. Baker et al.*, 9-547.

85. —. Courts have inflexibly enforced the rule that payment of stock subscriptions is good, as against creditors, only where payment has been made in money or what may be fairly considered as money's worth. *Id.*

86. —. A statute enacted that payment of the capital stock of corporations organized under that act might be made either in money or in land; the land to be appraised by the board of directors, and taken at such value. This provision does not supersede the obligation of subscribers to pay their subscriptions, as they appear in the certificate of organization; it simply provides the manner in which payment shall be made. In a suit by creditors against a stockholder, to compel him to pay his subscription, the inquiry is, has he paid in money or in the money's worth? In such case the directors, in the appraisement of land taken in payment of subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. *Id.*

87. SUBSCRIPTION FOR CASH PAID IN LABOR. Subscriptions to stock were made it being specified, in the agreement, such subscriptions should be "payable in cash." The fact that, afterward, labor was received by the corporation in lieu of cash, does not invalidate the agreement or excuse subscribers from the performance of their promise; *Ashuelot Boot & Shoe Co. v. Hoit*, 8-383.

88. SETTLEMENT IN DEPRECIATED MONEY. It is ultra vires the corporation to receive the amount of subscriptions to stock in any depreciated currency—in this case confederate scrip—and a subscriber who is called upon to pay in full, but who might have paid in such depreciated currency, not being bound to pay save upon regular and lawful assessment, is not precluded from objecting to such illegal action. Such illegal payments are no payment, wherefore the action is no defense in behalf of one sued upon his subscription; but, in another proceeding, on showing damage to himself, such stockholder can cause the parties supposed to have been released to pay up, in good money, all the loss which accrued by payment in bad; *Macon & Augusta Ry. Co. v. Vason et al.*, 7-4.

89. **SHAM PAYMENT.** Unpaid subscriptions to the capital stock of a corporation constitute a trust fund, for the benefit of the general creditors of the corporation. This trust can not be defeated, or the fund impaired, by a simulated or pretended payment for the stock taken, nor by any device short of actual payment in good faith; *Crawford et al. v. Rohrer et al.*, 9-407.

90. —. Any arrangements among the subscribers for stock, or those in charge of the affairs of a corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not, in fact, receiving the benefit of the price in good faith, will be regarded as a sham, and not as a valid, payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber. *Id.*

91. **SIMULATED PAYMENTS.** The officers and managers of a corporation are trustees of the subscriptions to its stock. They hold them as a trust fund for creditors. This trust can not be defeated by any simulated payment of the stock subscription, nor by any device short of actual payment in good faith; *Wetherbee v. Baker et al.*, 9-547.

92. **INSTANCE.** Five persons agreed for the purchase of a tract of land and organized themselves into a corporation, under a statute empowering the incorporation of land improvement companies. Such corporation was authorized to receive payment for stock in land, to be appraised by the directors. In the certificate of incorporation the capital was fixed at \$100,000. These persons subscribed for all the capital stock and became the directors of the company. The consideration of the purchase was \$50,000; the deed was made directly to the corporation and it gave its obligations for the purchase price. The directors then appraised the land at \$100,000 and credited \$50,000 of that valuation as a payment of fifty per cent. on the subscriptions to the capital stock. The lands were not worth to exceed the original purchase price, and the company acquired no other property. Suit was brought by a creditor of the corporation against the subscribers to the capital stock, to compel them to pay their subscription to satisfy debts of the corporation. It was held that, as against creditors of the corporation, the allowance of the credit on the subscriptions of the stockholders was invalid, and the stockholders were liable for the whole amount of their subscriptions to the capital stock, as they appeared in the certificate of organization. *Id.*

93. **DEFAULT IN PAYMENT FOR STOCK.** The law raises a promise to pay for stock subscribed for as it is lawfully assessed and demandable. The common law affords a remedy for recovery by action of assumpsit; subsequent enactments authorizing forfeiture and sale of the stock are cumulative as to the remedy; *Hughes v. Antietam Manuf. Co.*, 3-377.

94. **NON PAYMENT.** The subscribing for shares and the payment of a per centage only of their par value thereon, does not vest any

title, to the shares, in the subscriber; *Chetlain, adm'r, v. Republic Life Ins. Co. et al.*, **6**-397.

95. **EQUITY WILL ENFORCE PAYMENT.** It is well settled, that a court of equity may enforce payment of stock subscriptions though there have been no calls, for them, by the company; *Hatch v. Dana*, **6**-63.

96. **COLLECTION OF AMOUNT.** One who receives a certificate of stock at a given price per share becomes liable to pay therefor when called upon; and, it is no defense if the whole amount named in the articles of association, is not subscribed; *Chubb v. Upton*, **6**-23.

97. **UNPAID SUBSCRIPTION; LIEN UPON.** Where a railroad company assigns unpaid subscriptions to its stock to its president, in trust for certain definite purposes which have been fulfilled; and the company being insolvent, one of its judgment creditors brings an action under the 458th section of the code, to subject the amount due on such unpaid subscriptions to the payment of his judgment: Held, that, as to the amount due on such subscriptions after the fulfillment of the trust and the payment of all costs and expenses of its administration, the trustee is not entitled to retain from such fund the amount of indebtedness of the company to him, for his salary as president thereof, the plaintiff by his action having established a specific lien on the fund as against less diligent general creditors, and being entitled in equity to a preference over them in its distribution; *Dunbar v. Harrison et al.*, **3**-634.

98. **ASSIGNABLE QUALITY.** Where the amount due on a stock subscription has been regularly called in, by assessment, and stands as a liquidated demand on which suit will lie, it would seem that the claim can be assigned as well before judgment as afterward, though the assignment, like all assignments of choses in action, will be subject to equities and can not deprive the debtor of any rights of a stockholder; *Wells et al., surety for costs, v. Rogers*, **9**-487.

99. —. Unpaid balances upon stock subscriptions are corporate assets and are assignable; *Shockley v. Fisher*, **9**-520.

100. —. Unpaid balances on subscriptions for stock, being properly assigned, pass to the assignee, who may collect them. *Id.*

101. **CONDITIONS PRECEDENT TO SUIT UPON.** The promises of the respective parties to such a contract are concurrent and dependent. Neither can require the other to perform without performing, or offering to perform, on his part. A complaint in an action by the company, upon such a subscription, which does not aver that the company has issued, or offered to issue, the stock to the defendant is insufficient; *St. Paul, S. & T. F. R.R. Co. v. Robbins*, **7**-614.

102. —. A subscription to take stock, agreeably to the conditions therein expressed, is an agreement to take shares upon

a condition precedent. To authorize a recovery of the price, it must be satisfactorily shown the condition has been performed; *Belfast & M. L. R.R. Co. v. Cottrell*, 7-276.

103. TENDER OF CERTIFICATE. Upon a suit to recover the value of stock subscribed for, it is not necessary to aver the tender of certificate of shares in the absence of stipulation made upon subscription to the contrary; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

104. CONDITIONED ON AMOUNT TO BE SUBSCRIBED. In an action on a subscription conditioned upon a certain amount being subscribed, the plaintiff is bound to show affirmatively that the amount named had been subscribed before suit; *Galena & S. W. R.R. Co. v. Ennor*, 10-285.

105. —. Where the capital stock of a manufacturing corporation is fixed at a certain number of shares of a certain value per share no action will lie, against a subscriber, to enforce the payment of his subscription, until the whole capital stock is subscribed; *Garling v. Baechtel et al.*, 7-345.

106. ASSESSMENT AS PRECEDENT TO ACTION. By the terms of a subscription to stock, the subscriber agreed to take the stock and to pay all charges and assessments regularly levied or assessed by the board of directors. No assessment or call was made. In an action to recover the whole amount of the price of the stock the court of errors and appeals of New Jersey held, that, by the terms of the subscription, the company could recover only after assessment or call; *Grosse Isle Hotel Co. v. Exec'rs of Miles l'Anson*, 8-407.

107. —. When, by the contract of subscription for stock the price thereof is payable in instalments, as called for by the board of directors, such calls must be clearly proved as to the time of the call and the amount called in and recovery is to be limited to the aggregate amount of the calls, so far as not paid in; *South Georgia & Florida R.R. Co. v. Ayres*, 6-349.

108. PROOF OF NOTICE. Where a subscription to stock is payable in instalments, within twenty days after call by the properly authorized agents, in a suit to recover balances due upon the subscription it is essential to prove that notice of each call was given the appellant, of twenty days length of time and that notice was given twenty days before suit brought; *Cole v. Joliet Opera House Co.*, 6-357.

109. WHEN ACTION LIES ON. An action may be brought upon the original subscription and it is not necessary to aver calls, at least, after the lapse of two years from the time of incorporation, in the absence of condition contained in the subscription and where the statute requires the whole capital stock to be paid in within two years; *Phoenix Warehousing Co. v. Badger*, 8-476.

110. SOLVENCY OF SUBSCRIBERS. In the absence of statutory requirement as to the solvency of subscribers, as an element of

legal organization, it is not necessary, in a suit to recover the value of stock subscribed for, to aver and prove that all subscribers were, at the time of the subscription, solvent; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

111. **CONDITION FULFILLED BEFORE SUIT.** Where a subscription to stock is made subject to a condition precedent and suit is brought upon the same to recover the amount thereof, the right of recovery must exist at the time the action is commenced. It will not avail the corporation that the condition has been complied with after suit brought, but before trial; *M'Cann v. Amer. Centr. Ins. Co.*, 8-303.

112. **REPUDIATED CONDITION.** If a corporation could be allowed to repudiate and discard an arrangement upon which the stock was taken, rated among the original subscribers and settled for in a manner and extent to which it has been settled for, prior to its entry upon the corporate books as paid up stock upon which certificates issued, upon the ground that such agreement and dealing among the stockholders operated as a fraud upon the corporation, it could only be done by treating the parties as ordinary subscribers for the stock; *Granite Roofing Co. v. Michael*, 7-407.

113. **COMPULSORY PAYMENT OF.** The capital stock of a corporation subscribed is a substitute for the personal liability of partners in ordinary co-partnerships; and creditors are entitled to a bona fide exercise of the compulsory powers of the corporation to compel subscribers to pay in their subscriptions; *Wetherbee v. Baker et al.*, 9-547.

114. **RIGHT OF ACTION ON.** Where a person enters into a valid contract with a corporation, by which he agrees to subscribe for a certain number of shares of stock in the company, upon his failure and refusal to comply with that contract, without fault on the part of the corporation, the latter will have a right of action to recover such damages for the breach of the contract as it may have sustained; *Quick et al. v. Lemon*, 9-204.

115. **REMEDY AGAINST DELINQUENT.** The remedy against a delinquent subscriber is to enforce payment by a judgment for the money and not by a forfeiture or sale of the stock; *Gill's administratrix v. Kentucky etc. Min. Co.*, 3-346.

116. —. The corporation, consisting of stockholders who have subscribed an agreement to take and pay for shares of its stock when thereafter organized, having become organized, can maintain a suit against a delinquent subscriber to enforce the payment of his subscription; *Ashuelot Boot & Shoe Co. v. Hoyt*, 8-383.

117. **PROOF OF SUBSCRIPTION.** It is not necessary to prove that a subscription to capital stock was made in the handwriting of the stockholder. If it was made by his authority, or if made without his authority and he afterward ratified and adopted it, this is sufficient; *Musgrave v. Morrison et al., rec'rs etc.*, 7-411-

118. **PROOF OF SUBSCRIPTION.** A subscription to capital stock of a corporation is sufficiently shown by proof of the entry of the person's name on the proper books of the corporation as a stockholder, the issuing to him of evidence thereof, the payment by him of his dues, the receipt by him of profits earned, or supposed to be earned, and the appointment by him of a proxy to vote at meetings of the stockholders. *Id.*

119. —. The books for the subscription to stock, opened and kept by commissioners, appointed under a general incorporation act to receive subscriptions to stock, are in the nature of official registers, and are competent evidence to prove how much per mile has been subscribed to the capital stock; *Monroe v. F. W. & Sag. R.R. Co.*, 4-482.

120. **EVIDENCE OF ASSENT TO ACCEPTANCE OF CHARTER AMENDMENT.** The burden of showing assent of the stockholders to an act, imposing new burdens, is upon the corporation or party seeking to enforce the liability. It will not be presumed from the mere fact that bonds of the company were issued, in pursuance of the statute, by the directors, and their amount afterward assessed upon its members by a meeting of stockholders, at which the party sought to be charged was not present; *Ireland v. Palestine, Braffitsville etc. Turnpike Co.*, 4-1.

121. **ESTOPPEL.** Semble, after the certificate of incorporation, required by a general law for the incorporation of companies, has been recorded, the company organized, and, liabilities incurred, defects in the certificate of incorporation can not be set up as a defense by a subscriber, in an action against him, by the corporation, to compel payment by him of an assessment of his shares of stock; *Baile v. Calvert College Educational So.*, 7-379.

122. **WAIVER OF ILLEGALITY OF MEETING TO ORGANIZE.** A subscriber to stock of an incorporated company, being a director participating in the calling of a meeting for the permanent organization of the corporation, who attends such meeting, votes as the owner of stock, is elected a director at that meeting, and acts as such director, waives his right to object to the legality of the organization effected at the meeting, and thereby to avoid payment on his subscription on the ground of the insufficiency of the notice of the call of the meeting; *Bucksport & B. R.R. Co. v. Buck*, 7-318.

123. **ADMISSION OF CORPORATE ORGANIZATION.** A subscription read: "We, the undersigned, agree to subscribe the number of shares, of \$50 each, to the capital stock of the Mount Sterling Coal Road Company." This is a direct undertaking to pay an incorporated company a sum certain; it admits the existence of the corporation and its organization; *Lail v. Mount Sterling Coal Road Co.*, 7-172.

124. **ESTOPPEL TO DENY EXISTENCE.** One who subscribes to the capital stock of an organization which has attempted, irregularly,

to create itself into an incorporated company and acted as such, is estopped to deny the regularity of the organization; *Chubb v. Upton*, **6**-23.

125. ESTOPPEL TO DENY EXISTENCE. In an action to recover an unpaid balance of subscription to the capital stock of a corporation, one who has subscribed, actively taken part in the organization and management of the company, become one of its trustees and dealt with it as a lawful corporation is estopped to deny its lawful existence; *Phoenix Warehouse Co. v. Badger*, **5**-588.

126. —. Where subscribers to the stock of a private corporation meet, and elect a board of directors, and thereby effect a permanent organization, and engage in the corporate enterprise for several years, by which debts are incurred, voting and acting as bona fide subscribers, they will not be allowed to dispute the binding effect of their subscriptions, or the legality of the organization of the corporation as against third persons who give credit to the company, on the faith of its being legally organized; but will be required to pay their subscriptions in favor of creditors, who are entitled, in equity, to be subrogated to the rights of the company; *Hickling v. Wilson et al.*, **9**-177.

127. —. In an action to recover an unpaid balance of a subscription to the capital stock of a manufacturing corporation, where it appears that defendant subscribed for the stock, acted as a trustee of the corporation, took part in its management and contracted with it as a corporation, he can not dispute the validity of the incorporation; *Phoenix Warehouse Co. v. Badger*, **8**-476.

128. SUBSCRIBER ESTOPPED. Where a stockholder in the old company was instrumental in getting a receiver appointed and to have a sale made to a new company, and became a stockholder in the new company, knowing the purpose of its organization, he is estopped from asserting any interest, as a stockholder of the old company, in the assets as against the new company; *St. Louis & Sandoval Coal Co. v. Sandoval Coal Co.*, **10**-292.

129. IMMATERIAL EVIDENCE OF DEFENSE. In a suit to recover the amount of a subscription to capital stock, evidence of its value, or the value of any other stock, is inadmissible; nor is it necessary to show a certificate of stock tendered; or that the corporation has received the amount of stock authorized by charter; or — in the absence of a plea in abatement — that the company was organized and still exists as a corporation; *South Georgia & Florida R.R. Co. v. Ayres*, **6**-349.

130. RELEASE OF SUBSCRIBER. The directors of a corporation can not release a subscriber for stock from his liability as a stockholder; *Choteau Ins. Co. v. Floyd*, **8**-283.

131. PLEADING A RELEASE. A plea, by a subscriber to the stock of a corporation, in defense of an action to recover the amount of his subscription, that he has been released from his liability by the resolution of the directors is defective where it does not aver that

there was a consideration to support the resolution; *Zirkell v. Joliet Opera House Co.*, 6-363.

132. **PLEADING A RELEASE.** One pleading a release by the board of directors of his liability upon his subscription to stock, must, at least, aver that the corporation was free from debt at the time such release was executed, inasmuch as such directors could not so release if the company was indebted. *Id.*

133. **TRANSFER.** Defendant having subscribed for stock of a corporation, a subsequent arrangement was made, with the approval of the corporation, that he, defendant, should transfer a portion of his stock to another — one Egerton — the latter delivering to the corporation his notes therefor, indorsed by defendant, the stock to be transferred when the notes were paid. The notes, so given, were renewed from time to time and one of the renewals was transferred by the corporation to one Power, as collateral security for a claim against the company. Power returned it to the corporation and, with his consent, it was produced and offered for cancellation on the trial. The court of appeals of New York held defendant was not entitled to have the amount thereof deducted from the amount due on his subscription; *Phoenix Warehouse Co. v. Badger*, 8-476.

134. **CANCELLATION.** The cancellation of stock by the secretary of a corporation will not be effectual to release the subscriber from liability, if any exists, for unpaid instalments due on the stock. In this respect it is immaterial whether the cancellation was by or without direction of the board of directors. It is not within the power of the secretary or the board of directors to release a stockholder from the payment of his subscription to the stock of the corporation; *Rider v. Morrison et al., rec'r etc.*, 7-415.

135. **NON PAYMENT BY CO-STOCKHOLDERS.** An objection that other stockholders who have not paid should have been made, parties, is not available on appeal where the objection was not raised by answer and where there were no findings or requests to find in reference thereto, or exceptions raising the point; *Phoenix Warehouse Co. v. Badger*, 8-476.

136. **LAWFUL INCORPORATION.** When a suit is brought to recover upon a subscription to stock made upon original articles of association signed preliminary to incorporation, it is essential that the company suing shall aver in its complaint, and prove upon the hearing, that it has become lawfully incorporated. The party subscribing, in such case, is not estopped from denying the legality of the incorporation; *Nelson v. Blakey, assignee etc.*, 7-23.

137. —. Where a subscription for stock is made, with promise to pay therefor, before the organization of the company, it is necessary to a recovery at law thereon, that it should appear that the subsequent steps, essential to bring the corporation into existence, were duly taken; *Reed v. Richmond Street Ry. Co.*, 7-49.

138. **LAWFUL INCORPORATION.** Where a statute required that after a specified sum was subscribed, the company might proceed to organize by electing directors and signing articles of association setting forth certain facts, the adoption of preliminary articles not containing all the requisite facts is not sufficient; these should be properly drawn and subscribed; therefore, in suit to recover on preliminary subscription against one who did not be present at the subscribers' meeting, and who did not participate in naming directors, and in the absence of articles signed after organization, the corporation can not recover. *Id.*

139. **DEFECTIVE ARTICLES OF ASSOCIATION.** Defendant subscribed to articles of association which were duly acknowledged and filed. The corporation was organized under these, it elected officers, constructed its proposed road and put it into operation. The legislature by act recognized the company. Defendant paid in ten per cent. of the stock subscribed for by him; but, declined to pay the balance when called for. In an action to recover the unpaid balance it was no defense that the articles of association were defective in not definitely stating the termini of the road, or the counties through which it should pass, as, notwithstanding the defect, the shares of stock to which the subscription entitled the subscriber were shares in a corporation de facto; Cayuga Lake R.R. Co. v. Kyle, 8-443.

140. **IRREGULAR ORGANIZATION.** A subscriber to the capital stock of a corporation can not defend, in an action upon his subscription, upon any mere irregularity in the organization of the company, provided the company be a corporation de facto, and if he shall have met and contracted with the company, on the footing it was legally incorporated and competent to receive subscriptions, and gave the weight of his name to the project and pretensions of the company; Monroe v. Fort Wayne, Jackson & Saginaw R.R. Co., 4-482.

141. **IRREGULARITY OF BY-LAWS.** Irregularities in adopting by-laws by a private corporation, or in the election of its officers, where all the stockholders and officers of such corporation recognize and treat such by-laws as legal and valid, will not relieve a stockholder, who is afterward sued for the amount of his subscription to the capital stock of the corporation, from paying the amount of such subscription; Ginrich v. Patrons Mill Co., 7-142.

142. **CAPITAL NOT SUBSCRIBED.** When the amount of capital stock of a corporation is fixed and the number of shares ascertained by its charter, a subscriber is not obliged to pay his subscription unless the whole capital stock has been taken. This is a condition, however, which a subscriber may waive and the waiver may be either express or implied, as by participation in the affairs of the company; Morrison et al., rec'rs, v. Dorsey, 7-389.

143. ——. In an action against a stockholder of a corporation to recover a balance due on his subscription, the fact that the

whole amount of the capital stock has not been subscribed, is no bar to the action, provided the defendant stockholder knew that fact and participated in the affairs of the company, in such way as could only properly be done upon the assumption that the subscribers intended to proceed with the stock partially subscribed; *Stillman v. Dougherty, rec'r etc.*, 7-361.

144. CAPITAL NOT SUBSCRIBED. A subscriber to the capital stock of a corporation, chartered for an enterprise, is not bound to pay assessments unless the whole amount is subscribed; *Memphis Branch R.R. Co. v. Sullivan*, 7-1; *Memphis Branch R.R. Co. v. Omberg*, 7-1.

145. —. A subscriber for stock, sued upon his subscription, may show, in defense, the failure of the company to obtain the requisite amount of capital stock. In view of a law requiring a specified amount of stock, in the organization of a railroad company, per mile of the whole road authorized to be constructed, it will be held to be an implied condition that the aggregate amount required by the statute shall be subscribed; *Monroe v. F. W., J. & Sag. R.R. Co.*, 4-482.

146. FICTITIOUS SUBSCRIPTION. If there be a subscription for the whole amount of stock as fixed in the charter, but a large part of such subscriptions is merely nominal and is, afterward, released by the directors, so that, as matter of fact, the whole amount is not subscribed, a bona fide subscriber is not obliged to pay assessments based on his subscription; *Memphis Branch R.R. Co. v. Sullivan*, 7-1; *Memphis Branch R.R. Co. v. Omberg*, 7-1.

147. IN EXCESS OF AUTHORIZED CAPITAL. In an action by a corporation to recover the amount of a subscription to its stock, the fact of its having taken subscriptions in addition to, or in excess of, its authorized stock does not, per se, bar its right to recover. If it has retained a sufficient amount of its authorized stock, which it is ready and able to issue to the subscriber to such stock, upon performance by him of his part of the contract, it may recover against him. There can, however, be no recovery against a subscriber to the unauthorized excess of stock; *Oler v. Balt. & R. R.R. for use etc.*, 6-349.

148. ILLEGAL STOCK WHEN NOT A DEFENSE. The issuing of illegal stock constitutes no defense to notes given on subscription for stock, if the maker of the note can receive genuine stock on the payment of the note; *Merrill v. Beaver*, 6-549.

149. WHEN A DEFENSE. On a suit brought on a promissory note given in consideration among other things that shares of stock be delivered to pay or on payment of the sum to be paid, it will be a good defense that the corporation has issued illegal stock certificates which have passed from the control of the corporation and can not be distinguished from the genuine stock.
Id.

150. **VARIANT REQUIREMENTS OF LAW.** The statute of Michigan required, of an incorporated railroad company, that it should, before proceeding, obtain \$6,000 per mile subscribed for the entire road authorized to be built. The corporation, defendant in error, had sued upon a subscription note, having, after subscription made and before action instituted, consolidated with an Indiana corporation. The law of Indiana did not contain any similar provision. It was sought to defend the suit, upon the subscription, on the ground that \$6,000 per mile had not been subscribed for the entire road of the companies as consolidated. Held, that the requirement of the statute of Michigan has exclusive reference to corporations created in that state, for the construction of roads within its own borders, and was not intended to have any extra-territorial operation. It was sufficient to show a compliance with the law of Michigan as to the road to be built in that state; *Monroe v. Fort Wayne, Jackson & Saginaw R.R. Co.*, 4-482.

151. **RELEASE FROM, BY CHARTER AMENDMENT.** An amendment to the charter authorizing the company to proceed with the business contemplated, with a less sum than the whole amount required to be subscribed, is so material as to release a subscriber from his subscription, if accepted without his assent, and if he shall not have acquiesced in the authorized change; *Memphis Branch R.R. Co. v. Sullivan*, 7-1; *Memphis Branch R.R. Co. v. Omberg*, 7-1.

152. —. Acquiescence in an amendment of charter and in proceeding to the business of the company before all the capital stock is subscribed is not shown by proof that the party sought to be charged, has paid assessments on his subscription for mere preliminary purposes, as for surveys, the cost of procuring charter and the like. *Id.*

153. —. Changes, of the charter, in matters of detail, not affecting the substantial nature and material features of the engagement, or contract of subscription to stock, as entered into by the subscriber, will not release him; *New Haven & Derby R.R. Co. v. Chapman*; *Same v. Barker*, 4-320.

154. —. An amendment of the charter or act of incorporation of a corporation, which merely enlarges its original purposes, will not release a stockholder from his original obligation; *Peoria & R. I. R.R. Co. v. Preston*, 4-389.

155. **INCREASE OF CAPITAL.** If the capital stock, after subscription made, were changed from \$50,000 to \$150,000, without assent of the subscriber or his subsequent acquiescence, he is discharged from all liability on account of his subscription. The acknowledgment, by him, of the certificate before a proper officer, if at that time he was ignorant of the change, can not be construed to be a new contract; *Hughes v. Antietam Manuf. Co.* etc., 3-377.

156. **VARYING THE CONTRACT.** The written instrument is the only competent evidence of the agreement of subscription; and, its terms can not be contradicted by parol proof that, at the time it was signed, the understanding was that the payment should not be according to calls, but without any call whatever; *Grosse Isle Hotel Co. v. Executors of P'Anson*, 8-407.

157. —. The fact that, notwithstanding the terms of the subscription, the subscriber paid the full price for part of the stock subscribed for, does not establish his liability to pay in like manner for the residue and is not evidence of an agreement, on his part, to pay without call. *Id.*

158. —. While the law may regard as illegal and fraudulent, an agreement parties in interest may have made in respect to the manner of entering and treating stock subscribed for, it will not arbitrarily incorporate, in lieu thereof, terms in the contract to which the parties never assented; *Granite Roofing Co. v. Michael*, 7-407.

159. **SALE OF PROPERTY.** If a corporation, chartered to perform a certain work—as to continue and operate a railway—sells its road to another company, against the will of a subscriber for stock and without authority of law, it can not collect unpaid subscriptions to its stock; *South Georgia & Florida R.R. Co. v. Ayers*, 6-349.

160. **SEIZURE BY STATE.** Upon suit to recover upon subscription for stock subscribed—in this case to a railroad company—it is no defense that the governor of the state, acting for the state, has seized the road to the uses of the state; *Mullins v. North & South R.R. Co.*, 6-342.

161. **TRANSFER OF FRANCHISE.** A sale and transfer of the powers of one corporation to another, without the sanction of law, are against public policy, in disregard of the duties and obligations of the company, and as a mere unlawful attempt to accomplish what can only be done by the legislature, such attempted sale and transfer would constitute no defense to an action to recover the amount of a subscription for stock; *Ottawa, Oswego & Fox River Valley R.R. Co. v. Black et al.*, 6-359.

162. **SUBSEQUENT FORECLOSURE.** After the commencement of an action to recover an unpaid balance upon a subscription for stock in a corporation—in this case a railroad company—a mortgage executed by the plaintiff company upon its road was foreclosed. This was no defense to the action; *Buffalo etc. R.R. Co. v. Gifford*, 9-605.

162½. —. It was averred, in form, in defense of an action to recover the amount of a subscription to the stock of a railroad corporation, that the company had been chartered to make a road with termini designated; that the railroad was sold under a mortgage, and the purchasers became a body corporate under a subsequent legislative act, and defendant subscribed to the stock of

that company; that plaintiff had completed its road, but to neither of the terminal points designated, it having abandoned the road in one direction toward the terminus for a distance of eight miles, and located two thousand feet distant from the other terminal site. Held, to be, *prima facie*, a good defense; *Chartiers Ry. Co. v. Hodgens*, **5-618**.

163. **ABANDONMENT.** It is no defense as against creditors that the company has abandoned the purposes and business of the incorporation; *Phoenix Warehouse Co. v. Badger*, **5-588**.

164. —. An abandonment of its business by a corporation, either before or after the commencement of an action to recover an unpaid balance of subscription for stock, is no defense where it appears that the corporation is indebted in a sum greater than the amount of the subscription, the action being prosecuted for the benefit of creditors; *Phoenix Warehousing Co. v. Badger*, **8-476**.

165. —. The articles of association stated that plaintiff's road — in this case a railroad — was to be constructed, maintained and operated from the city of Buffalo to a point on the state line, between the states of New York and Pennsylvania. The road was actually built from Buffalo to Jamestown, about twelve miles north of the state line. The construction of the road south of Jamestown, the trial court found, was given up and abandoned by plaintiff. There was no proof, or finding, that such portion was legally or formally abandoned; the proof was simply that the construction stopped at Jamestown. Plaintiff was not released from his subscription by the omission of plaintiff to construct its road to the state line; *Buffalo etc. R.R. Co. v. Gifford*, **9-605**.

166. **IRREGULARITY NO DEFENSE.** Formal irregularities or defects, as when a subscription to a proposed railroad does not correctly describe the termini of the road to be built, will not avoid the subscription; *Boston, Barre & Gardner R.R. Co. v. Wellington*, **5-442**.

167. **CHANGE OF CORPORATE NAME.** A valid subscription to the capital stock of an incorporated company is not rendered invalid by a change of the corporate name, effected by act of the legislature; and the company may sue for and recover the subscription under its new name; *Bucksport & B. R.R. Co. v. Buck*, **7-318**.

168. **ABSURD DEFENSE TO SUIT.** The fact that a corporation (located upon a water power) created to build and maintain a flouring mill, is expending its money in building a dam, by means of which to obtain power to run its mill, will not relieve a stockholder from paying the amount of his subscription to the capital stock of the corporation, organized to build and maintain a flouring mill; *Ginrich v. Patrons Mill Co.*, **7-142**.

169. **LOCATION OF BUSINESS.** It is not a defense to an action to recover the amount of a subscription to stock, that the corporation has not located its place of business, as contemplated by the charter; *Courtright v. Deeds*, **5-366**.

170. **FAILURE OF CONSIDERATION.** The exercise of any legitimate power, granted by the charter, can never be held, however disastrous to the enterprise, to constitute a failure for subscription to capital stock; *Ottawa, Oswego & Fox River Valley R.R. Co. v. Black et al.*, 6-359.

171. **MIS-MANAGEMENT.** The mere mis-management of a corporation has never been held to release stockholders, or others, from their obligations to the company; *Chetlain, adm'r, v. Republic Life Ins. Co. et al.*, 6-387.

172. —. Unwise management of the affairs of a corporation not illegal, though it may impair the value of the stock, constitutes no defense to a note given in consideration of such stock. Stockholders assume some degree of risk of unwise, or even unlawful, management and are remitted to their remedy at law in resistance of the enforcement of void obligations; *Merrill v. Beaver*, 6-549.

173. **EXTRAVAGANT PURCHASE.** That a corporation should purchase a large and expensive building, in which to transact its business, and, also, the stock of another company, furnishes no defense against the payment of a subscription to stock or the obligation given for its payment. If such acts were unauthorized the remedy is in equity to have them set aside and the consideration paid restored; *Chetlain, adm'r, v. Republic Life Ins. Co. et al.*, 6-397.

174. **ALTERATION OF SUBSCRIPTION PAPER.** In an action to recover the amount unpaid on a subscription for stock in a corporation a motion for non suit was made, on the ground of an alteration in the subscription paper. Defendant's subscription was made after that of one C. When produced, the subscription papers showed the name of C. cancelled, by lines across it, and opposite it appeared the words, "By agree't Mar. 5, 1873," a date subsequent to the time defendant subscribed. No explanation of the cancellation, aside from the paper, was given. It was held that the alteration did not per se discharge defendant; that each subscription constituted a separate and independent agreement and, in the absence of proof, there could be no presumption that defendant was induced to subscribe because C. had done so; *Whittlesey, rec'r etc., v. Frantz, adm'x etc.*, 8-550.

175. **REPRESENTATIONS OF PROMOTER.** In the location of a road, of a corporation, a promoter of the company can not bind the corporation subsequently formed and a subscriber having no right to rely upon such statements, it is no defense to a suit to recover upon the subscription that the road is not laid out as the location was stated to be originally intended; *Miller v. Wild Cat Gravel Road Co.*, 7-58.

176. —. A representation that one subscribing for stock will not be required to pay the subscription can not impose upon the most unsuspecting. *Id.*

177. **REPRESENTATIONS OF PROMOTER.** A subscriber can not have his contract of subscription set aside, and his payments refunded, simply on the ground that the agents of the corporation represented that it would put a certain amount of working capital into the concern and failed to do so, when such subscriber had full knowledge of the condition of the corporation, and its lack of funds, and no specific method for raising funds was agreed upon; *Goff v. Hawkeye Pump Co.*, 10-370.

178. **MIS-REPRESENTATION TO INDUCE.** It seems that a stockholder can not defeat an assessment by evidence that he subscribed to the stock in reliance upon representations of an agent of the corporation that certain persons, in whom he had confidence, were stockholders, such persons not being bona fide stockholders; *Choteau Ins. Co. v. Floyd*, 8-283.

179. —. If the representations are as to matters controlled by the charter of the corporation, and as to which the subscriber is in law bound to know that the agent has no right to make representations inconsistent therewith, they will not avoid the subscription. As to matters not controlled by the charter, false and fraudulent representations, which come within the limitations and by which one has been entrapped into a subscription, will avoid the contract, just as fraud vitiates contracts of every character; *Selma, Marion & Memphis R.R. Co. v. Anderson*, 8-27.

180. —. In order to avoid a contract of subscription to capital stock, for representations made to the subscriber, it must appear that the subscription was made upon the faith of false representations of the agent, in regard to a matter of fact, material to the value and success of the enterprise; *Hughes v. Antietam Manuf. Co.*, 3-377.

181. **FALSE REPRESENTATIONS.** In an action by the assignee in bankruptcy of an acting corporation, to recover unpaid subscriptions upon its stock, the defense of false and fraudulent representations, inducing the subscription, can not be set up; *Chubb v. Upton*, 6-23.

182. —. The property of a corporation was incumbered by a trust deed. The trustee released a portion of the trust property agreeing to look only to the portion thereof not released, for payment. This release was duly recorded. The corporation obtained subscriptions to its stock on the assurance that there was no incumbrance on the property, so released, and the subscriber for stock relied on this assurance. In an action to recover upon the subscription, the false representation being set up, by way of defense, it was held the subscription was obtained by misrepresentation and that no recovery could be had thereon; *Water Valley Manuf. Co. v. Seaman*, 8-32.

183. —. A statement on the part of the agent of a corporation, soliciting subscriptions, as to the pecuniary condition and prospects of his corporation, will not avoid a subscription, unless

the falsity and fraud of such representations are clearly shown and unless it is manifest that the condition of the enterprise constituted a material inducement to the subscription ; *Selma, Marion & Memphis R.R. Co. v. Anderson*, 8-27.

184. FALSE REPRESENTATIONS. To avoid a subscription on the ground of false representations of an agent, it must be shown that the statement was not uttered as an opinion but as an ascertained and existing fact. It must not only be false in fact, but must, also, be either known to be so by the party uttering it, or his position must be one that made it his duty to know the truth. The resisting subscriber must show that he acted upon such statement ; that his own position was such as warranted him in so acting ; and, that the statement was as to a fact material to the question of his subscription. *Id.*

185. —. When the defendant set up as a defense that the note was procured from him by the company by means of false and fraudulent representations made by its officers, to the effect that these companies had legally consolidated, and the proof showed that articles of consolidation between the parties had been drawn up and signed, and officers of this new organization had been elected, and had entered upon the discharge of their duties. Held, that this was sufficient to repel the presumption of false representation that the companies had legally consolidated, unless the persons making them knew that the consolidation was illegal and unauthorized ; *Mitchell v. Deeds*, 1-460.

186. FRAUDULENT REPRESENTATIONS. The defendant, having set up as a defense that he was induced to execute said note by means of false and fraudulent representations, made to him by the officers of the company, concerning its solvency, and the progress of its road to completion, he must prove it, otherwise he must fail on this issue. Where fraudulent representations are relied upon as a defense, they must be established like any other fraud. *Id.*

187. FRAUD IN PROCURING. Though a subscription to the stock of a corporation may have been induced by fraudulent representations, the subscriber can not recover the amount he has paid thereon, if there are creditors to a larger, or equal amount, no debts contracted after his subscription. As to such debts the funds of the corporation, including his subscription, are assets held in trust for their payment ; *Turner v. Grangers Life & Health Ins. Co.*, 7-21.

188. —. Where representations made by an agent, to obtain subscriptions, are a part of a scheme of fraud, participated in by the officers authorized to manage its affairs ; or where they are such as the agent may, reasonably, be presumed, by the subscriber, to have the authority of the corporation to make, his representations may be given in evidence to show the fraud, by means of which the subscription was procured. When there is no reason-

able presumption of authority and no actual authority to make them, the corporation should not be prejudiced by the unauthorized acts of the agent; *Custar v. Titusville Gas & Water Co.*, 4-101.

189. FRAUD IN PROCURING. When the representation of the agent, to obtain subscriptions, is contrary to the interest and duty of the corporation, as that he will release, or has authority to release, the subscription he is taking, it is not a reasonable presumption that he has such authority, and a subscriber, on such terms, will be held to all the responsibilities of a bona fide subscriber. *Id.*

190. —. On trial of an action for deceit in the sale of the stock of a corporation, defendant called as a witness the treasurer of the corporation, who produced his cash book and testified that he showed it to the plaintiff before he bought his stock of the defendant. It was held to be competent, on the part of plaintiff, to cross examine the witness as to the manner of keeping this book and to show that it was not fairly kept and did not contain a correct statement of the affairs of the corporation; *Teague v. Irwin*, 9-461.

191. SET OFF; FRAUD. To a suit by a corporation against one of its stockholders, defendant may plead and recover, as set off, any sum of money obtained from him by fraud, as a subscription to the stock; unless, being a subscriber, there are debts of the corporation unpaid, incurred after his subscription, to the amount of the sum so paid; *Hamilton et al. v. Grangers Life & Health Ins. Co.*, 9-55.

192. INTEREST IN SUIT. There being a right to recover upon a stock subscription unpaid, and the road having passed from the original owners to the state, the court believes the recovery should be for the use of the state; *Mullins v. N. & S. R.R. Co.*, 6-342.

193. RIGHT OF SUBSCRIBER ON ASSIGNMENT MADE. In an action, by the assignee of a claim for an amount unpaid on a stock assessment, the defendant, if a stockholder in the company executing the assignment, may have a right to know whether or not he is sued by a purchaser for value; and, he can, therefore, show the consideration of the assignment; *Wells et al. v. Rogers*, 9-487.

194. INCREASE OF CAPITAL STOCK. The same rule applies upon an increase of the capital stock, as to any portion of such increase subscribed for; *Chubb v. Upton*, 6-23.

195. UNPAID SUBSCRIPTIONS. In the case of an insolvent corporation, creditors are not compelled to wait for the winding up of the corporation, but may proceed and subject their unpaid subscription to the payment of their claims; but to do so they should first recover a judgment at law against the corporation, and have execution returned unsatisfied; *Patterson v. Lynde*, 10-239.

196. **PROCEEDINGS TO COLLECT.** A proceeding by a creditor against the unpaid subscriptions of a corporation, is in the nature of an equitable attachment by which the debts due the company may be applied to the payment of the company's debts. The creditor is subrogated to the place of the debtor corporation. A foreign insolvent corporation owing debts, if still in existence, can be compelled by mandamus or bill in equity to collect its unpaid subscriptions wherever the stockholders may reside, and if it has ceased to exist, a receiver may be appointed, and the courts of other states, as a matter of comity, will recognize the right of the receiver to prosecute actions at law for the recovery of unpaid subscriptions. *Id.*

197. —. A creditor may proceed in equity on an admitted or established claim, against a stockholder or stockholders, to enforce his or their liability, to an insolvent corporation, for the amount remaining due on his, or their, subscription to the stock of the corporation, although no account is asked to be taken of the other indebtedness of the company; and it makes no difference in this respect that, by the terms of the subscription, as prescribed by statute (Md. Code, art. 26, § 65) the stock may be called in and demanded from the stockholders only "at such times and in such payments and instalments as the trustees, directors, or managers may deem proper." Such call by the trustees, directors or managers is but a step in the process of collection and a court of equity can pursue its own mode of collection, provided no injustice be done to the stockholder; *Crawford et al. v. Rohrer et al.*, 9-407

198. **CONTRIBUTION.** The assets of a defunct corporation, in excess of what is necessary to pay its debts, belong to the stockholders and the stockholder is only required to pay his pro rata share of the amount needed to pay the debts; *Patterson v. Lynde*, 10-239.

199. **LIABILITY ON STOCK NOTES.** A stockholder in an insolvent corporation, who has given his note, for an amount remaining unpaid on his subscription for stock, is not legally bound to pay more of his subscription than may be necessary to satisfy outstanding debts. Hence the necessity, in an action to enforce such a liability, the amount of those debts should be averred and proved; *Lamar Ins. Co. v. Moore*, 6-390.

200. —. Where a company — in this case an insurance company — becomes insolvent and its effects are placed under the control of a receiver, stock notes are nothing more than instruments to be used in the same manner, and for the same purpose, as the capital stock could be used. That is, as an indemnity, to be applied to the discharge of the liabilities of the corporation. *Id.*

201. **SET OFF IN INSOLVENCY.** A stockholder of an insolvent corporation can not set off against his indebtedness for stock an indebtedness of the company to him; *Sawyer v. Hoag*, 5-25.

202. **RECEIVER.** An action to recover an unpaid subscription commenced by a corporation may be carried on by a receiver in behalf of creditors, should the company become insolvent pending the action; *Phoenix Warehouse Co. v. Badger*, 5-588.

203. **DEFENSE TO ACTION BY RECEIVER.** In an action by the receiver, of a corporation, to recover from a stockholder an assessment upon his shares of stock which are not fully paid, the holder of such shares can not defend on the ground there was fraud in the appointment of the receiver, or that the corporation is not as matter of fact, indebted. These matters are, as to the suit to recover, *res adjudicata*. He must interpose in the original proceeding making the appointment; *Schoonover v. Hinckley*, 6-535.

204. **STATUTE OF LIMITATIONS.** A statute which declares stockholders liable individually for the payment of the debts of the corporation contracted while they are stockholders, and provides that the creditor prosecuting the company for the recovery of the same, may include one or more of the stockholders liable to contribute to its payment, but, in case of a recovery against the company and the stockholders, no execution shall be levied on the property of the stockholders, except for such deficiency as might remain unsatisfied after the property of the company has been levied upon and applied thereto, so operates that whenever a cause of action accrues against the corporation, it also accrues against the stockholders, wherefore as to the stockholders, as well as the company, the statute of limitations then commences to run. If, therefore, action against a stockholder be not instituted within the period prescribed by the statute of limitations, it is barred; *Conklin v. Furman et al.*, 4-568.

205. **ON BANKRUPTCY.** Unpaid subscriptions of stock form part of the assets of a corporation. Therefore, if the corporation be adjudged a bankrupt and an assignee in bankruptcy be appointed, such unpaid subscriptions pass to the assignee, and suit for the recovery of the amounts unpaid can be had only in suit brought in his name; *Lane et al. v. Nickerson et al.*, 6-513.

See **CONSOLIDATION**; **CORPORATE EXISTENCE**; **EDUCATIONAL INSTITUTIONS**; **ESTOPPEL**; **PERSONAL LIABILITY**; **RECEIVER**; **RELIGIOUS SOCIETY**; **STOCK AND STOCKHOLDER**; **VOLUNTARY ASSOCIATION**.

SURETIES; see **BOND**; **BY-LAWS**; **CONTRACT**; **PROMISSORY NOTES**.

SURPLUS PROFITS; see **DIVIDEND**; **EQUITY**; **TAXATION**.

SURRENDER OF CHARTER.

1. **RIGHT.** A private corporation may surrender its franchises. When a method of dissolution is prescribed by statute that method must be pursued; *People etc. v. President and Trustees*, 1-161.

2. **NEW CHARTER.** The acceptance of a new charter by a cor-

poration, is a surrender of exemptions before existing; *State v. Maine Central R.R. Co.*, 7-284.

3. SURRENDER OF CHARTER. A unanimous vote of the stockholders is not necessary to a surrender of the franchises of a corporation. The dissent of one stockholder should not be allowed to prevent a surrender desired by all the other members of the association; *Wilson v. Proprietors of Central Bridge et al.*, 4-154.

4. ACCEPTANCE. The general rule is that the acceptance by the government of the surrender of corporate existence is necessary to effect a dissolution of the corporation. Exception is, some time, made where, by the charter of incorporation, the stockholders are made individually liable for the debts of the corporation; *LaGrange etc. R.R. Co. v. Rainey*, 4-175.

5. — OF SURRENDER. The general rule is that a surrender of a charter, even by a unanimous vote, must be accepted by the state, in order to effect a dissolution of the company. Where a statute authorizes the location and building of a free bridge upon the surrender, by an existing bridge company, of its charter, such action may be taken without waiting for a formal acceptance, by the state, of the surrender; *Wilson v. Proprietors of Central Bridge et al.*, 4-154.

6. EFFECT. Where a corporation surrenders its charter it can neither sue nor be sued, although the obligation of its contracts survive and may be enforced against any property that belonged to it, as a corporation, which has not passed in to the hand of a bona fide purchaser; *City Ins. Co. v. Com'l Bk.*, 5-219.

SUSPENSION OF POWERS; see RECEIVER.

T.

TAXATION.

1. CHARTER CONSTRUED; CONSTITUTIONAL LAW. It is provided by the charter of the city of Little Rock, "that the inhabitants of said city are hereby exempted from working upon any road beyond the limits of the city, and from paying any tax to procure laborers to work upon the same." Held, (1) that the tax contemplated by this provision of the charter was a tax upon inhabitants, and not upon property; that it was intended to apply to requisitions upon persons for labor, or a sum in commutation thereof; (2) that a construction which would exempt the property of the inhabitants of Little Rock from taxation for county road purposes, would render the charter inconsistent with that provision of the constitution which requires the enactment of laws "taxing, by a uniform rule, all moneys, credits, investments in bonds, joint stock companies or otherwise, and also all real and

personal property according to its true value in money ;" *Fletcher v. Oliver, sheriff*, 2-47.

2. **POWER.** The charter of the city of Augusta invested the city council with the "full power and authority to make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same . . . as shall appear to them expedient." Held, that this conferred no power upon the city to levy taxes upon gross sales of cotton, upon commissions received by commission merchants and cotton factors, upon sales of goods, wares and merchandise, and upon receipts for storage ; *Wheless & Co. v. City Council of Augusta*, 2-127.

3. **PRIVATE CORPORATIONS.** It was held that, inasmuch as the revenue laws of Georgia did not treat a corporation independently of its capital as property subject to taxation, it was not competent for the city of Augusta to levy a specific tax upon an insurance and banking company of said city ; *City Council of Augusta v. Walton*, 2-130.

4. **STATE TAXES ; LEVY BY COUNTY BOARD.** When the levy of state taxes is made by legislative enactment, the omission of a county board of commissioners, even when required by statute, does not affect the validity of the tax and does not constitute a sufficient objection to its collection ; *State of Nevada v. Manhattan Silver Mining Co.*, 2-607.

5. **COUNTY TAX.** The rule is otherwise as to county tax, which is levied by the county board, within the limits of the maximum fixed by the statute. *Id.*

6. **EQUALIZATION.** Under the statute of Nevada, the equalization of taxes levied on mines, is a privilege which the tax payers may claim at any time before suit is brought ; but the omission to equalize when no demand is made can not be set up as a defense against the collection of the tax. *Id.*

7. **TAX ON PROCEEDS.** A tax of one and one quarter per cent. upon the proceeds of a mine, for each quarter during the year, is not a tax of five per cent. per annum upon the mine. *Id.*

8. **ACT NOT RETROACTIVE.** The act of April 2, 1867, was not objectionable as being retroactive in its operation, because it required the levy and payment of a tax upon the proceeds of mines, raised during the first quarter of that year, the proceeds for that quarter, though removed from the state at the date of the passage of the act, constituted a part of the proceeds for the year and constituted a part of the basis of taxation. *Id.*

9. **SERVICES OF POLICE.** The tax to pay the salaries of the police commissioners of the city of Louisville and county of Jefferson does not cease to be a tax and become a legislative spoliation, because levied upon the property of the city alone ; *Police Commissioners v. City of Louisville*, 2-331.

10. **BOUNTIES.** The act of the legislature of the state of Illinois, of February 7, 1865, authorizing certain counties therein named

to levy and collect taxes for the payment of bounties to persons who might enlist and be mustered into the service of the United States, is constitutional ; *Stebbens v. Leamen*, 2-168.

11. **STATUTE CONSTRUED.** The city of Henderson was authorized to levy a tax for a specific purpose "upon the tax payers of the city, taxable under the revenue laws of the state." Held, that the tax should be levied as of the same date and upon the same persons and property that are taxable under the revenue laws of the state ; *Barrett v. City of Henderson*, 2-349.

12. **ROAD PURPOSES IN SPECIAL DISTRICT.** The legislature of Kentucky incorporated a small suburban community near Newport, called "The District of Highlands," and authorized its trustees "to grade and pave or macadamize with rock or gravel any public road passing through or in to said district, within the limits thereof, and with the assent of two-thirds of the owners of real estate by or through which any such road may pass, to levy special taxes on such real estate to pay for such grading and paving or macadamizing. Held, that the act was valid under a constitutional provision prohibiting unequal taxation ; *Malchus v. District of Highlands*, 2-361.

13. **LICENSE AND GENERAL TAX.** In the contract between a municipal corporation and a street railway company, the latter, in consideration of privileges granted, agreed to pay to the former a license tax of \$25 for every car used. It was held that the payment of this tax did not exonerate the said company from the payment of an ad valorem tax on its property, horses, stables, etc., which are assessable for municipal purposes ; *Louisville City Ry. Co. v. City of Louisville*, 2-358.

14. **PENALTY.** An exaction of ten per cent. for non payment of an assessed tax within a prescribed time is not a penalty for the enforcement of which an indictment or other judicial process is necessary. *Id.*

15. **AGRICULTURAL LANDS.** Lands lying within the limits of an addition to a city, which are used for agricultural purposes, which are remote from the city proper, and to or near which no streets or alleys have ever been worked, are not liable to taxation for city purposes ; *Deeds v. Sanborn*, 2-315.

16. **AUCTIONEER.** A city of the second class, organized under the general incorporation law of the state of Iowa, has no power, either under said law or under chapter 97, laws of 1862, to impose a special tax upon sales of goods at auction by a resident merchant engaged in ordinary business ; *City of Oskaloosa v. Tullis & Faxon*, 2-297.

17. **COLLECTION BY SALE.** The grant of power to a municipal corporation to levy and collect special taxes on lots within the corporation, for the improvement of walks in front thereof, does not include the power to sell and convey, in case of non payment of the tax. Nor will such power be inferred from an express

provision in the charter to the effect that the collection of the taxes provided for shall be enforced as may be provided by ordinances of the city; *Merriam v. Moody's ex'rs*, 2-283.

18. **MODE OF COLLECTION.** When such grant of power exists, and the charter or constituent act is silent as to the mode of collection, the grant is not, by reason of such silence, nugatory, but the city may provide for the collection of the tax by due course of law. *Id.*

19. **STATUTE CONSTRUED.** To bring proceedings of a city or town within the clause of the statute of 1866, chapter 152, "proceedings already begun in any city or town for re-imbursement under said act," to individuals, of money contributed by them to fill its quota of troops, there must have been, before the time when the repealing statute took effect, either the borrowing of money, or the creating of a legal debt against the city or town, or a vote sufficient to warrant the assessors in proceeding to levy a tax to raise money for the purpose of re-imbursement; *Copeland v. Inhabitants of Huntington et al.*, 2-479.

20. **ESTOPPEL.** No previous delay of the taxable inhabitants of a town to complain, under the general statutes, chapter 18, section 79, against the payment from its treasury of money for purposes other than those for which it has the legal right and power, will bar the right of complainants to a remedy on the statutes, if their petition is filed or their suit commenced before the money is actually paid. *Id.*

21. **REMEDY IN EQUITY.** In Massachusetts the remedy at law of a person upon whom a tax is illegally assessed by a town or city is plain, adequate, complete and exclusive, in event of the collection of the tax; and the supreme judicial court has no jurisdiction in equity to restrain such collection; *Loud et al. v. City of Charlestown*, 2-472.

22. **RECOVERY OF TAXES PAID.** A municipal corporation is not liable for the re-payment of taxes paid to it by mistake of law; *Hubbard v. City of Hickman*, 2-347.

23. **EXERCISE OF TAXING POWER.** A state may impose taxes upon a corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate property. The manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion; *Delaware R.R. Tax Cases*, 5-30.

24. —. It is not in the power of the legislature, of Illinois, under the constitution of 1848, to confer upon private persons or corporations the authority to levy and collect taxes or special assessments on real estate; *Board of Directors etc. v. Houston*, 5-260.

25. —. The exercise of the authority, which every state possesses, to tax its corporations and all their property, real and personal, and their franchises and to graduate the tax upon the

corporations according to their business or income, or the value of their property, when it is not done by discriminating against rights held in other states and the tax is not on imports, exports or tonnage or transportation to other states, can not be regarded as conflicting with the constitutional power of congress; Delaware R.R. Tax Cases, 5-30.

26. EXERCISE OF TAXING POWER. The legislature of the state of Iowa has the power, under the constitution of the state, to impose a tax upon the property of a corporation of the class of a toll bridge company, as the property of the corporation, and, also, to impose a tax on the shares of the corporate stock, as the property of the stockholder. But, this decision has no application to capital stock in manufacturing companies, such stock being exempt from assessment and taxation by chapter 57 of the laws of 1880; Cook et al., exec'rs, v. City of Burlington et al., 9-307.

27. —. The legislature, of the state of California, has the power to declare that the property of a corporation shall be taxed in its hands and that it shall not be again taxed as of the ownership of stockholders and members; People, ex rel. Burke, v. Badlam, 6-274.

28. POWER CAN NOT BE DELEGATED. Under the constitution of the state of Illinois the right to levy taxes can not be delegated to private persons or private corporations; Hessler v. Drainage Commissioners, 1-467.

29. OF A CORPORATION. Quære; whether, under the statutes of the state of New York, there is any other method of taxation of a corporation than by assessing its capital stock at its actual value, without regard to the situs of its property; People, ex rel. Pacific Mail Steamship Co., v. Comm'rs of Taxes etc., 8-447.

30. NOT NECESSARILY UNIFORM AS TO CORPORATIONS. The element of uniformity is necessary to the validity of a tax levied upon the persons and property of the citizens, but a tax imposed upon a corporation, as such, is not a tax on the persons or property of the corporators or stockholders. It is the artificial being, the mere legal entity, which is taxed, and the tax is paid out of the funds of such legal creation, known as a corporation, and not by corporators or stockholders in their personal character. Immunities claimed for the individual members of a corporation can not be extended to the corporation itself; Ducat v. City of Chicago, 1-426.

31. DOUBLE TAXATION. It is the general policy of the law to avoid double taxation, and this is considered in the construction of statutes imposing taxes; but, when the language of a statute is clear, the fact that it imposes double taxation will never justify a court in disregarding it; Toll Bridge Co. v. Osborn, 3-156.

32. —. The constitution of California neither authorizes nor requires double taxation. To the contrary it forbids it; People, ex rel. Burke, v. Badlam, 6-274.

33. **DOUBLE TAXATION.** It is against the policy of the state of Alabama to subject the same property to double taxation and courts will not so construe a statute as to impose such double tax, unless such construction is required by express words or by necessary implication ; but, where a mass of property, subject to taxation, is covered by the general clause in the statute, while it falls partly within and partly without the terms of a special clause, effect will be given to each clause, by holding the general clause applicable only to that portion which does not fall within the special clause ; thus avoiding a double tax as to any part of the property and, yet, not allowing any to entirely escape taxation ; Board of Revenue etc. *v.* Montgomery Gas Light Co., 6-175.

34. **EXEMPTION.** Taxation is one of the highest and most important of the sovereign powers of the state and no person or corporation is to be held exempt, unless by clear and express words, or an implication as strong and conclusive as express words ; Cook, collector, *v.* State, 3-574.

35. —. An express authority granted to a corporation to acquire and hold property, not exceeding a certain amount, must be considered and construed in reference to the objects for which it may be held, and to mean so much of the limited amount as is needed for those objects, and the exemption from taxation must be limited to the property held for those objects and for no other. *Id.*

36. —. When exemption from taxation is granted to a corporation, property held by it, for the purposes for which it was chartered and necessary for those purposes, should be free from tax ; but, if the property be held or used for other purposes, even if connected with and convenient for the transaction of its business, it should not be free. *Id.*

37. **CONSTRUCTION OF EXEMPTION.** The charter of a corporation declared that "the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind." This exemption embraces only the land, so dedicated, with the permanent improvements thereon ; it does not extend to, or embrace, any personal property the company may own, nor a fund reserved from proceeds, under the charter, for the maintenance of the cemetery in good order ; State of Md. *v.* Wilson, pres. etc., 7-404.

38. **REPEAL OF EXEMPTION.** Where the charter of a company provided that its stock should be exempted from all taxation except such as was then imposed upon the stock of another class of corporations, and, afterward, an amendment of the charter was passed by the legislative department of the government and accepted by the corporation, which provided that the stock of the company should be subject to such tax as the legislature should desire to levy, the exemption clause of the charter was repealed ; Macon & Augusta R.R. Co. *v.* Goldsmith, comptroller general,

7-16; Goldsmith, comptroller general, *v. Macon & Augusta R.R. Co.*, 7-16.

39. EXEMPTION. Where one company, by its charter, was granted exemption from taxation for a period certain and limited and was consolidated with and merged in another company which was exempt from taxation in perpetuity, unless its dividends exceeded the rate of lawful interest, which latter company became vested with all the property, rights and privileges of the former, the exemption and its limitation accompanied the property, and the perpetual exemption from taxation in the charter of the latter company would not extend to the property acquired by the amalgamation, in the absence of express words, or necessary implication, to that effect; *Tomlinson v. Branch*, 4-249.

40. —. Under its charter, the Good Samaritan Hospital was "exempted from taxation of every kind." The exemption did not cover special assessments against the property of the hospital, for improvements of the street on which its property fronted; *Sheehan, Jr. v. Good Samaritan Hospital*, 4-509.

41. —. Re-affirmed that, in the absence of constitutional prohibition or limitation, it is competent for the legislature of a state to grant perpetual exemption from taxation; *Tomlinson v. Branch*, 4-249.

42. —. A railway company can not be held to be released from ordinary taxation on any structure on lands which have not, or might not have been taken by condemnation under the authority of its charter; *State v. Hancock*, 3-566.

43. —. An exemption of property of a railroad corporation, from ordinary taxation, couched in general terms, will not be held to extend to property acquired by purchase outside of the line of the road. *Id.*

44. —. An assessment for benefits conferred by the laying out of a highway is not, in the popular or common acceptance of the term, a tax, and is not within the meaning of an act which provides that a sum payable directly to the state treasury "shall take the place and be in lieu of all other taxes;" *City of Bridgeport v. New York & New Haven R.R. Co.*, 3-189.

45. —. The legislature of Missouri passed an act incorporating a charitable institution, and providing that the property of the corporation should be free from taxation and that certain sections of the general incorporation act, which provided for the right of the legislature to alter, suspend or repeal all charters, should not apply to this. It was held that such legislation amounted to a contract, between the state and the incorporators, that the property acquired in accordance with the provisions of the act and applied to the uses specified in the charter, should be exempted from taxation, and that a subsequent act to tax the property was an indirect mode of impairing the obligation of a contract and void; *Home of the Friendless v. Rouse*, 3-7.

46. **EXEMPTION.** As to the right of a state to bargain away the taxing power of the state, see dissenting opinion of FIELD, *j. Id.*, note 1.

47. **EXEMPTION FROM LOSS.** If the state buys in the franchises and property of a corporation and, afterward, sells them to new parties, the purchase by the state extinguishes any exemption of the original company from taxes which does not revive in favor of the later purchasers; *Trask v. Maguire*, 5-42.

48. **RULE OF CONSTRUCTION AS TO EXEMPTIONS.** It has been repeatedly held that the legislature of a state may exempt particular parcels of property, or the property of particular persons or corporations, from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected and that, when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract and is equally inviolate with its other stipulations. Before, however, any such exemption or limitation can be admitted the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the state by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved; *Delaware R.R. Tax Cases*, 5-30.

49. **THE RULE APPLIED.** Applying this rule of construction to an act (of the legislature of Delaware) under which the consolidation of two railroad companies, the Wilmington and Susquehanna and the Delaware and Maryland, was authorized, which provided that the new company, created by the amalgamation, should pay annually into the treasury of the state, a tax of one quarter of one per cent. upon its capital stock of \$400,000, the court held that the provision did not prevent a subsequent legislature from imposing a further and different tax upon the company. It was nothing more than a simple declaration of the tax then to be paid and until a different rate or rule of taxation should be established. *Id.*

50. **OF PROPERTY OF AND IN CORPORATIONS.** The constitution forbidding double taxation forbids the taxation of shares of stock in the ownership of individuals, if the entire property of the corporation, which alone the stock represents, is taxed; *People, ex rel. Burke, v. Badlam*, 6-274.

51. ——. So, it is, also of moneys deposited in savings banks. The bank paying tax upon all moneys it has on deposit, it would be a double taxation to assess the money deposited, against the depositors. *Id.*

52. **EXEMPTION OF STOCK.** A corporation the stock of which is by law exempted from taxation can not be taxed on its property. The stock of the company represents the corporate property and

a tax on the one is a tax on the other; *Scotland County v. Missouri, Iowa & Nebraska Ry. Co.*, 8-159.

53. EXEMPTION OF CORPORATIONS. Section 13 of article 12 of the constitution of the state of Mississippi declares that "the property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals." This section was not intended to confer power on the legislature to tax property of corporations of the class mentioned, for such power existed, without the provision, as an inherent legislative power. It was not intended to require the taxation of property of corporations whose charters, previously granted, secured them from taxation, for this was beyond the power of the framers of the constitution. It was not designed to establish the rule that all corporations for pecuniary profits must always be taxed; nor was it intended to exempt from taxation the property of corporations other than those for pecuniary profits; *Mississippi Mills v. Cook*, tax collector, 8-37.

54. —. The section, above recited, does not declare that the property of all corporations for pecuniary profit shall be subjected to taxation, but that it shall be subject to taxation—that is, liable to taxation. It makes such property subject to taxation, the same as that of individuals; so that, subject to section 20 of the same article, which provides that "taxation shall be equal and uniform throughout the state," and that "all property shall be taxed in proportion to its value, to be ascertained as directed by law," the legislature may, at all times, impose taxes on the property of such corporations as it may on the property of individuals. Section 13, above quoted, fixes beyond legislative act the condition of the property of such corporations as being liable to the exercise of the taxing power of the will of the legislature and as subject to the same taxation that the property of individuals may be subjected to. The legislature may exempt property of a particular class, whether the owners be corporations or natural persons; but, the property of corporations for pecuniary profit can not be placed beyond the reach of the taxing power. It may not be taxed; but, it must be ever liable. It need not be subjected; but, it must always be subject to taxation, the same as that of individuals. The provision is mandatory as to the universal liability of such property to be taxed; but, permissive to the legislature to tax or exempt it, as may seem proper, in common with the property of individuals; *CHALMERS, J.*, dissenting. *Id.*

55. —. Section 20 of article 12 of the constitution of Mississippi provides, that "taxation shall be equal and uniform throughout the state; all property shall be taxed in proportion to its value, to be ascertained as directed by law." The first clause of this section establishes the rule of equality and uniformity as to taxation throughout the state, and the latter clause requires that all property shall be taxed in proportion to its value. The

words "all property shall be taxed in proportion to its value," do not require that all property shall be taxed and deny the legislature the right to exempt any. The purpose of their employment is to fix the rule for taxation and to protect against any taxation of property except in proportion to its value, to be ascertained as directed by law. This provision does not prohibit exemption. The legislature may exempt property of a certain class or property used for a certain purpose. The legislature has the power to select such objects of taxation as they may deem appropriate; but, when any article of property is selected for taxation, it must be taxed in proportion to its value and not specifically. *Id.*

56. EXEMPTION OF CORPORATIONS. Any legislative act, whether a charter or other statute, the purpose of which is to exempt the property of corporations for pecuniary profit, and to put it in condition where it will not be subject to taxation, is in conflict with sections 13 and 20 of article 12 of the constitution of the state and, of course, confers no immunity against subsequent legislation; CHALMERS, J., dissenting. *Id.*

57. EFFECT OF SUBSEQUENT CONSTITUTIONAL PROHIBITION. Constitutional conventions have no more power over vested rights than ordinary legislative bodies; therefore, a constitutional provision prohibiting the exemption of any property from taxation, save as provided for in the constitution itself, will not be effectual to impose or authorize the imposition of a tax upon property of a corporation exempted from such taxation by charter theretofore passed and accepted; *Scotland County v. Mo., Iowa & Neb. Ry. Co.*, 8-447.

58. TRANSFER OF IMMUNITY FROM. Upon the sale of the property of a corporation and its franchises (when the latter may be lawfully transferred under a sale) under a foreclosure decree founded upon a mortgage which, in terms, covers such franchises, or under legal process upon a money judgment against the company, immunity from taxation, upon the property of the corporation, provided in the act of incorporation, does not accompany the property in its transfer to the purchaser, it not being, of itself, a franchise which passes, as such, without other description; *Morgan v. State of Louisiana*, 6-12.

59. OF PROPERTY "WITHIN THE CITY." A corporation was organized under the laws of the state of Illinois, in which state it owned real estate, kept office, kept its ferry boats tied up when not in actual use. Its principal office was in St. Louis, Missouri, where its president, vice president and other principal officers resided; and where its ordinary business meetings were held and its corporate seal kept. Its boats were prohibited from remaining in St. Louis longer than ten minutes at any one time. It was held that its boats were not subject to taxation in St. Louis

under a law providing for the taxation of all property "within the city;" *City of St. Louis v. Wiggins Ferry Co.*, 3-79.

60. **PROPERTY TEMPORARILY ABSENT.** Assuming that the personal property of a corporation located outside of the state is, in any event, entitled to exemption from taxation, a temporary absence is not sufficient to create the exemption, the change of location, to effect such object, must be permanent, positive and unequivocal; *People, ex rel., v. Comm'rs of Taxes etc.*, 8-447.

61. **PROPERTY IN COURSE OF CONSTRUCTION OUTSIDE THE STATE.** The fact that a corporation — in this case a steamship company — located for the purposes of taxation in the state of New York, had invested a portion of its assets in property — steamships — owned by and being built for it outside the state, does not exempt it from taxation upon such property. *Id.*

62. **ON FRANCHISE.** The tax of a certain per centage of the par of its capital stock imposed by the statute of Massachusetts on every company or association "having an office or place of business within said commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the commonwealth in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the commonwealth," is warranted by the constitution of the commonwealth, and is not in conflict with the constitution of the United States; *Att'y Gen. v. Bay State Mining Co.*, 1-612.

63. —. The tax imposed by the statute of 1865, chapter 283, on corporations chartered by the commonwealth of Massachusetts, or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, is a tax on their franchises and not on their property, and it is no reason for abatement of any portion of such a tax, that, in computing the market value of the capital stock of the corporation as the true value of its corporate franchise, the tax commissioner omits to make any deduction for a portion of its property invested in bonds of the United States, which are exempt from taxation by any state; *Manufacturers Ins. Co. v. Loud, treas.*, 1-611.

64. —. A statute of the state of Connecticut requires the mutual insurance companies chartered in said state to make an annual return, under oath, to the state comptroller of the total amount of cash capital belonging to them on the first day of October. It also requires that they shall pay, to the treasurer of the state, a sum equal to one per cent. on such capital. Held, that it was upon the franchise of the corporation and not upon its property as such; and that, therefore, the corporation was not entitled to deduct from the amount of its capital, so to be returned, the amount of bonds of the state and of the United States held by it and by law exempt from taxation; (*a*) that declared dividends on

hand intended to be applied on premium notes as they should mature, said notes not being included in the cash capital, should not be deducted from the cash capital in ascertaining the basis of the tax; (b) that ascertained unpaid losses should be deducted from the cash capital in ascertaining such basis; Coite, treasurer etc., v. Connecticut Mutual Life Ins. Co., 3-198.

65. ON FRANCHISE. The statute constituted the treasurer and comptroller of the state a board to examine and correct all statements returned to the comptroller, for the purpose above mentioned, and further provided that if such return should not be made, or should in the opinion of the board be incorrect, the board should, within ten days after the time limited for making such return, make out such statement upon the best information they can obtain; that a copy of such statement approved, corrected or made out by the board should be sent by them to the corporation interested, and that their decision shall be final as to the value and amount of the property of such corporation. The defendants made a return on the 1st day of October, 1865, in the following words:—"Total amount of cash capital (less \$3,134,026 United States and state bonds), \$1,994,799." It did not appear that any action had been taken by the board; but it did appear that the defendant had paid the tax to the treasurer upon the basis of the return as made. Held, (a) that there was no presumption that the board had exercised its jurisdiction in the matter, and that the burden of proof upon the point was upon the defendant; (b) that any approval of the return of the board which might be inferred was to be regarded as an approval of the statement as to the whole amount of the cash capital and was not to be taken as an approval of any deductions therefrom, the statement of such deductions not being an appropriate part of such return; (c) that the provisions of the act with regard to the sending of a copy of the approved or corrected statement was merely directory, and the sending of such copy not essential to the proceeding. *Id.*

66. ACT CONSTRUED. The legislature of Delaware passed an act, taxing railroad and canal companies, April 8, 1869. Section 4 of the act provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the state, for the use of the state, annually, a tax of one-fourth of one per cent. upon the actual cash value of every share of its capital stock; with a proviso that when the line of the railroad or canal belonging to a company liable to the tax lay partly in the state and partly in an adjoining state, or states, the company should only be required to pay the tax on such number of shares of its capital stock as would be in that proportion to the whole number of shares which the length of the road or canal within the limits of the state should bear to the whole length of such road or canal. Held, (a) that the tax was not imposed on the shares of the individual shareholders or upon the property of the corporation, but

was a tax upon the corporation itself, measured by a per centage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though arbitrary, is approximately just and one which the legislature was at liberty to adopt; (b) such tax did not conflict with the power of congress to regulate commerce among the several states; nor interfere with the transit of persons and property from one state to, or through, another, otherwise than by increasing the expense attendant upon the use or possession of the thing taxed; Delaware R.R. Tax Cases, 5-30.

67. CAPITAL STOCK; PERSONALTY. Capital stock of a corporation is personal property, being in its very nature changeable and transitory, and having no element to liken it to real estate. For the purpose of taxation the corporate property stands in the place of shares of capital stock and when the latter is taxed the former is exempt. Shares of capital stock have always been regarded as personal property, in the same manner as promissory notes and bonds; Cooper et al. v. Corbin et al., 9-192.

68. LIEN OF TAX ON CAPITAL STOCK. Taxes on personal property are not a lien or charge upon any specific property until the tax books are delivered to the collector. After such delivery of the tax books, the collector may levy on any personal property found in the hands of the person against whom the taxes have been assessed; but this levy will be subject to any incumbrance on the property created prior to the time he received the books. So, a tax on the capital stock of a railroad company, being a tax on personal property, is subject to this rule. *Id.*

69. LIEN ON REALTY. Taxes upon real estate are a lien or charge upon the land itself, from and after the first day of May in each year they are levied, and if not paid, the land may be sold for their payment, and the title will pass regardless of any incumbrances resting thereon, whether such incumbrances are created before or after the lien has so attached. *Id.*

70. SHARES OF STOCK. A statute provided, as to corporations, that real estate belonging to them should be assessed and taxed at its value in the counties in which such property should be situated and that after deducting the value of the real estate, so assessed, from the aggregate value of the total number of shares of capital stock of the corporation, an assessment should be laid upon the ascertained value of each share of stock in addition to the assessed value of the real estate. The manifest intention of the statute is to reach, for the purposes of taxation, all the taxable property, having an actual or constructive situs within the limits of the state. It is competent for the state to tax such shares in the hands of non residents and the assessment of the stock of a corporation is not illegal because its value is determined by including realty in another state, in which the company has

invested part of its capital; *American Coal Co. v. County Commissioners etc.*, **9**-401.

71. OF MINING STOCK. Where the stock in a corporation — in this case a mining company — is assessed to the stockholders, for the respective shares held by them, the assessment of the tangible property of the corporation and the payment of the taxes levied thereon does not relieve the stockholders from liability to pay on the excess of the valuation of the entire stock over the valuation of the tangible property of the corporation; *Ryan v. Board of Comm'rs of Leavenworth Co. et al.*, **9**-359.

72. EARNINGS. A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed; *Delaware R.R. Tax Cases*, **5**-30.

73. SURPLUS PROFITS. A corporation issued to its stockholders certificates, each to the effect that the stockholder named therein had an interest in its property in which the surplus profits had been invested. The company stipulated to pay interest upon the amount of each certificate and reserved the right to redeem each in money or stock on notice of ten days. The gross amount of such certificates existed in the hands of the corporation as surplus and, as such, was liable to assessment and taxation; *People, ex rel. Williamsburg Gas Light Co., v. Board of Assessors*, **8**-566.

74. —. In such case the certificate could not be considered as creating an indebtedness and, as such, to be allowed as a deduction from the value of the surplus profits. Conceding they were valid obligations, enforceable according to their terms, they were not evidences of indebtedness, as a holder could not demand and have from the company a sum of money thereon. If the company elected to redeem them by the issue of stock, the property would still remain in the control of the company and subject to taxation. *Id.*

75. DIVIDENDS. Dividends earned by a railroad company before, but declared after, the 31st of December, 1869, are not taxable under the acts of 1864 and 1867; *Philadelphia & Reading R.R. Co. v. Barnes*, **1**-115.

76. —; DOUBLE TAXATION. When a corporation has earned, declared and paid out dividends during the current year, such dividends became income and gains of the shareholder, to whom they were paid and he became liable to have them assessed against him at the next assessment, as gains and income accruing during the preceding year. If these are taxed against the corporation and the shareholder it is double taxation and unlawful; *Board of Revenue etc. v. Montgomery Gas L. Co.*, **3**-175.

77. STOCK DIVIDENDS. A corporation having reserved profits to an amount exceeding twenty per cent. of its capital and having authority to create additional stock, declared a dividend of twenty per cent. on its existing shares, payable, in six years, to their then

holders, either in money or stock, at the option of the corporation, interest thereon to be paid, meanwhile, on a certain day each year, to the holders, on that day. After declaring this dividend it created new stock of the same par value, but the market value of the old shares, to which the privilege of the dividend was thus attached, were twenty per cent. more than that of the new shares, and the difference was owing wholly to this privilege. Held, that in computing the true value of the corporate franchise, for the purposes of taxation, under the statute of 1865, chapter 283, section 4, the tax commissioner was not in error in estimating the fair cash valuation of all the shares of the capital stock, by adding the actual market value of the old shares to that of the new shares, without making any deduction on account of the dividend; *Boston & Lowell R.R. Co. v. Commonwealth*, 1-638.

78. **UNION PACIFIC RAILROAD.** The interest of the general government in the Union Pacific Railroad Company, though chartered and aided by congress, is not such as to exempt the company and its property from taxation by a state through which the road is located and operated; *Union Pacific R.R. Co. v. County of Lincoln*, 1-125.

79. —. The doctrine of the implied exemption of federal instrumentalities from state taxation, considered and applied to this corporation, and the result reached, that it is not such an instrumentality, and if, in any case, it is such, that the paramount rights of the government would not be affected, and, under the acts of congress, could not be injured by any subordinate right of the state to tax and sell the property of the corporation. *Id.*

80. —. Under the legislation of Nebraska, the county of Lincoln has the right to tax railroads in the adjoining territory attached to it for revenue purposes. *Id.*

81. **TAXABLE PROPERTY.** A farm purchased, for a supply of gravel, by a railway company, and a branch built from their main line one and three-fourths miles long, leading to it, are subject like other property to taxation, though its charter may provide that such company shall pay in to the treasury of the state, yearly, a tax of one-half of one per cent. upon its capital stock, and that no other tax shall be imposed on said company; *State v. Hancock*, 3-566.

82. **RAILROAD CAN NOT BE SOLD IN PARCELS.** A railroad and all its appurtenances are treated in law as one entire thing, and can not be taxed or sold to enforce the payment of taxes in parcels consisting of all the road within a particular county; *Applegate et al. v. Ernst et al.*, 1-552.

83. **FOR PAYMENT OF SUBSCRIPTION.** A railroad can not be taxed by a county to raise money to pay a subscription by such county, to aid in the construction of such railroad. *Id.*

84. **NATIONAL BANKS.** Congress has power to establish a national bank in any state, and provide that the share of its capital

stock shall be exempt from taxation by other states; and the act of congress of 1864 renders the taxation by state authority of national bank stock unlawful when the bank is situated in another state; *Flint v. Board of aldermen etc.*, 1-607.

85. NATIONAL BANKS. A state may impose upon the shares of the stock of a national bank the same taxes imposed upon shares in banks organized under the laws of the state; and may require the payment of such taxes by the officers of the banks for the shareholders; *Commonwealth v. First National Bank of Louisville*, 1-554.

86. —. The proviso, of the forty-first section of the act of 3d June, 1864, forbidding the states to impose upon national bank stock taxes higher than those imposed upon shares in any of the banks organized under state authority, was intended to apply to banks of issue; *Lionberger v. Rouse*, 3-17.

87. —. The statute of Michigan authorized the levy and collection of an annual specific tax of one per cent. upon the capital stock paid in of all national banks, less the value of real estate owned by such banks, in commutation of all other taxes upon said banks or the shares owned by individuals. Held, by act of congress the state may tax the shares of stock, but not the capital stock itself; *Smith v. First National Bank of Tecumseh*, 3-485.

88. —. The national banking act provides that the taxation, in states, of shares under it, shall not be "at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of the state." The language of this clause does not require the strict literal and narrow interpretation of a penal statute. It means that such shares shall be taxed upon a general system and in compliance with a set of rules and principles applied alike, throughout the state, to the taxation of all moneyed capital, and the requirement of the restriction is complied with if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located; *Providence Inst. for Sav. v. Boston*, and *Jewell v. Boston*, 3-427.

89. —. The state of Missouri, prior to the creation of national banks, created ten banks providing in the act, under which they were organized, a limitation upon the power to impose taxes upon them. The legislature provided by a general law for the creation of other banks the property of which should be taxed the same as other property in the state. Held, that shares in the national bank could be taxed by the state at the same rates provided by the general law; *Lionberger v. Rouse*, 3-17.

90. FRANCHISE. An assessment, upon a franchise, is legal if grounded on a direct and immediate benefit, in the increase of the value of the property or stock of a corporation; *City of Bridgeport v. N. Y. & N. H. R.R. Co.*, 3-189.

91. **TAX ON BUSINESS OF BANK.** Under a statute, of the state of Nevada, a tax was levied on and sought to be collected from the "promissory notes bearing interest and secured by mortgage and otherwise," and "county warrants and scrip," the property of a national bank. Held, that a tax on these choses in action would be a tax on the business of the bank, wherefore in conflict with the national banking act of congress and judgment refused; *State of Nevada v. First Nat. Bank*, 3-543.

92. **SCHOOL.** Where a female seminary which was originally located upon a tract of eight acres of land on which were erected the buildings of the institution, afterward acquired other lands which were within the common inclosure of the seminary grounds, with dividing fences within the common inclosure, and the several tracts were used for walks and lawns for the exercise and benefit of the scholars, for a garden to supply the institution with vegetables, and another part for an orchard to supply fruit for the institution, and all for the exclusive use of the institution, held, such lands were exempt from taxation, under the statute relating to exemptions of property of institutions of learning. A separate block, not in the common inclosure, in the absence of proof as to what use is made of it, can not be held to be exempt; *Monticello Female Seminary v. People*, 10-197.

93. **FOREIGN CORPORATIONS.** Foreign corporations, whether organized under the laws of a state of the Union or of a foreign government, may be taxed by another state for the privilege of conducting the business within the latter; *Liverpool Ins. Co. v. Commonwealth*, 1-60.

94. —. An English insurance company, some of whose members are subjects of Great Britain, and the others citizens of a state of this nation other than Massachusetts, and which, though not incorporated, is, by act of parliament, clothed with rights of acting independently of the rules that govern an ordinary partnership, is liable to the tax imposed by the statute of Massachusetts discriminating in taxation between foreign and domestic insurance companies; *Oliver v. Liverpool & London Life and Fire Ins. Co.*, 1-646.

See **ASSESSMENT; CONSTITUTIONAL LAW; LEGISLATIVE POWER.**

TELEGRAPH COMPANY.

1. **ELECTRIC TELEGRAPH.** The power to regulate commerce between states is not confined to the instrumentalities of commerce known, or in use, when the federal constitution was adopted; but, it keeps pace with and adapts itself to the new developments of time and circumstance. The electric telegraph has become one of the necessities of commerce, and, as such, it has come under the controlling power of congress; *Pensacola Tel. Co. v. W. Un. Tel. Co.*, 6-48.

2. —. The federal congress having exercised its power to

regulate commerce between the states, in respect to the construction of lines of telegraph, a state can not directly, nor by indirection, exclude a foreign telegraph company from doing business within its limits; but, by the legislation of congress, in this regard, only national privileges are granted; *Amer. Un. Tel. Co. v. W. Un. Tel. Co.*, 6-186.

3. **GOOD FAITH REQUIRED OF.** Telegraph companies, like railroad companies, owe important duties to the public. They must act in good faith toward the public, and can not, by general conditions, demand unreasonable concessions from those who propose to send messages; *Sweetland v. Illinois & Mississippi Tel. Co.*, 3-306.

4. **RIGHT TO MAKE BUSINESS RULES.** Telegraph companies have the right to make reasonable rules and regulations for the proper conducting of their ordinary telegraphing business, but they can not thus exempt themselves from responsibility for a want of fidelity and care in the exercise of the employment which they undertake to prosecute; *W. Un. Tel. Co. v. Graham*, 4-293.

5. ——. Telegraph companies may, within certain limits of reasonableness, establish rules and regulations which, in causes not depending on statute, may govern the manner of sending messages and the prices to be paid for messages, repeated messages and insured messages, but, such companies can not make such rules and regulations as will protect them from liability for damages resulting from their own gross negligence or the gross negligence of their agents and servants; *W. Un. Tel. Co. v. Buchanan*, 4-372.

6. **REGULATION OF BUSINESS.** A regulation the design of which is to protect the company from responsibility on account of the gross negligence or fraud of its agents and employes in the transmission or delivery of a message which the company undertakes, for a valuable consideration, to send, is unreasonable, against sound public policy and void; *Candee v. W. Un. Tel. Co.*, 5-633.

7. **CLAIMS TO BE PRESENTED IN SIXTY DAYS.** One of the conditions of liability on the part of a telegraph company was, that claims for damages should be presented, in writing, within sixty days after sending the message. This is not an unreasonable requirement; the contract contained in the condition falls within the legal maxim *conventio vincit legem*; *Way et al. v. W. Un. Tel. Co.*, 4-88.

8. **REGULATION TO REPEAT MESSAGE.** To the extent of exempting a telegraph company from liability beyond a stipulated amount for any cause except wilful misconduct or gross negligence or delay in the transmission or delivery of a message, or for non delivery, as that it shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated, by sending it back to the office which first received it and pays half the regulation rate additional, is a rule that is reasonable and

binding upon one who shall assent to it; *Grinnell v. W. Un. Tel. Co.*, 5-447.

9. **UNREPEATED MESSAGES.** The regulation requiring messages to be repeated, printed on the blank, of a telegraph company, on which a message is written, is not a contract binding in law. The law imposes, upon the company, the duty of transmitting messages correctly, and the tariff paid is the consideration for the performance of this duty, in each particular case. When the charges are paid, the duty of the company begins, and there is, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost; *W. Un. Tel. Co. v. Tyler et al.*, 5-317.

10. **HALF RATES.** A rule adopted by a telegraph company that it will receive and send messages, by night, at half its usual rates, "on condition that the company shall not be liable for errors or delay in the transmission or delivery or for the non delivery of such messages, from whatever cause occurring, and shall only be bound, in such cases, to return the amount paid by the sender," is against public policy; and is, therefore, void, even if assented to by the sender; *Bartlett v. W. Un. Tel. Co.*, 5-406.

11. —. A telegraph company prescribed a regulation for the conduct of the business of transmitting half rate or night despatches which provided "that the company shall not be liable for errors or delay in the transmission, or delivery, or for non delivery of such messages, from whatever cause occurring, and shall only be bound, in such case, to return the amount paid by the sender." In an action to recover for injury received for delay in transmission; held, that such regulation is void (1) as against public policy; (2) as being without consideration, and (3) because it is legally impossible to create and not create an obligation or duty at the same moment and by one and the same act; *Candee v. W. Un. Tel. Co.*, 5-633.

12. —. It is void, also, because its terms are repugnant, assuming to impose an obligation, and, by the same act, to release from all obligation; *Bartlett v. W. Un. Tel. Co.*, 5-406.

13. **EXEMPTION FROM LIABILITY; NEGLIGENCE.** The usual regulation, of telegraph companies, exempting them from liability for errors in unrepeatd messages, exempts them only for errors arising from causes beyond their own control. The inaccuracy of the message being proved, the onus of relieving themselves, from the presumption of negligence thereby raised, rests upon the company; *W. Un. Tel. Co. v. Tyler et al.*, 5-317.

14. **KNOWN VALID REGULATIONS BINDING.** One who employs a telegraph corporation is bound by valid regulations of the company which are known to him, albeit he does not write and sign his message on a printed blank under the printed statement of such regulations; *W. Un. Tel. Co. v. Buchanan*, 4-372.

15. **ASSENT TO CONDITIONS.** One who writes a message for transmission upon such a printed blank, is deemed to assent thereto, and bound by it; *Redpath et al. v. W. Un. Tel. Co.*, 5-426.

16. —. An omission to transmit a message written upon such blank, furnished by the telegraph company, is gross negligence upon the part of the company's agent and, notwithstanding the terms of the contract of limitation of liability, the company is liable in damages as for a breach of its contract to transmit and deliver; *Candee v. W. Un. Tel. Co.*, 5-633.

17. **RISK OF THE CUSTOMER.** The nature of the business of telegraphing is suggestive of many risks and contingencies to which no other business, or agency, is subject. The electric current may be interrupted and the current broken, without fault of the corporation, so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transmitting may occur without fault on the part of the person transcribing it, or technical terms may be used, not easily expressed by telegraphy, and in which errors may occur without fault. These and risks of the like character, are upon the person sending the message, unless he elects to comply with the terms of the company and have the despatch repeated, by which certain risks are guarded against and errors prevented or insured against; *Baldwin et al. v. U. S. Tel. Co.*, 4-542.

18. **GENERAL LIABILITY.** While telegraph companies are not insurers and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance, in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents. *Id.*

19. —. The liability of a telegraph company is not precisely that of a common carrier, as it does not undertake for carriage but to render the service of transmitting a message, not in the form in which it is received, but by electricity. It impliedly engages to provide adequate instruments and apparatus, skillful operators and that care and skill adequate to the nature of the service shall be used in transmitting the message, and for failure, in either of these points, it is liable in damages; *Grinnell v. W. Un. Tel. Co.*, 5-447.

20. **STATUTORY LIABILITY.** A statute provided, among other things, that every electric telegraph company, engaged in telegraphing for the public, should, in case of failure to transmit any dispatch, on payment or tender of the usual charge according to the regulations of the company, be subject to a penalty of \$100. By regulation the company attempted to fix another rule of liability, i. e., that it should refund, to the sender of the dispatch, the amount paid by him for sending it, in case of an unrepeatable message, and not exceeding fifty times the amount paid, in case

of a repeated message. Held, that the company could not change the degree or measure of its statutory liability by the adoption of rules and regulations; *W. Un. Tel. Co. v. Buchanan*, 4-372.

21. **LIMITATION OF LIABILITY.** A telegraph company may, within reasonable limits, impose restrictions on the liability which it assumes. One who writes a message for transmission, on a printed blank, expressing such restriction, will be deemed to have given his assent thereto, and to have entered into a written agreement to send the message, according to the terms he has thus subscribed, and will be bound by it; *Way et al. v. W. Un. Tel. Co.*, 4-88.

22. —. A telegraph company may, within reasonable limits, impose restrictions on the liability which it assumes, and one who writes a message, for transmission, on a printed blank expressing such a restriction, is deemed to assent thereto and will be held bound by it. *Id.*

23. —. One who sends a message by telegraph, written upon the usual blank, furnished by the company, but does not, according to the stipulations printed on such blank, cause the message to be repeated, can not recover a greater amount for a mistake in its transmittal than is stipulated, in the absence of gross negligence or fraud; *Redpath et al. v. W. Un. Tel. Co.*, 5-426.

24. —. It would seem that notwithstanding a statute making a telegraph company "liable for all mistakes in transmitting messages made by any person" in its employment, as well as for all damages resulting from a failure to perform any other duty required by law, such company may adopt reasonable rules, conditions and regulations to govern the transmission of messages and restricting its liability, as by providing for the repetition of messages; *Sweetland v. Ill. & Miss. Tel. Co.*, 3-306.

25. —. While a company may, in the absence of a statute to the contrary, limit its liability by conditions or stipulations attached to the message it receives for transmission, still, it is responsible for mistakes, in such transmission or delivery, happening in consequence of its own fault; such as the want of proper skill or ordinary care on the part of its operators, or the use of defective instruments — but is not, under such conditions, responsible for mistakes occasioned by uncontrollable causes, such as atmospheric electricity—provided these mistakes could not have been ascertained and guarded against, or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company. *Id.*

26. —. Any right of a telegraph company to impose restrictions on its liability, in the transmission of dispatches, is limited to such as are needful to protect it against errors and miscarriages incident to the nature of the business. Notwithstanding a special condition contained in a contract restricting its liability in case of an inaccurate transmission of the message, the company

will be liable for mistakes happening by reason of its default; in this case, to promptly deliver the message after it had been correctly transmitted and taken from the wire; *W. Un. Tel. Co. v. Graham*, 4-293.

27. **LIABILITY FOR NEGLIGENCE.** A telegraph company can not by general printed conditions relieve itself from liability for the unskillful, improper or negligent conduct of its servants, or the use of defective instruments; *Sweetland v. Ill. & Miss. Tel. Co.*, 3-306.

28. **ORDINARY CARE.** A telegraph company, notwithstanding a condition imposed on the receipt and transmission of messages, limiting liability except in the event of repeating, is still liable for the exercise of ordinary care and skill in the transmission and delivery. *Id.*

29. **CONNECTING LINES.** Two lines of telegraph companies, being co-terminous, the receiving by either of messages transmitted over the line of the other, to be transmitted, does not raise an inference of partnership or mutual agency. Each, in the absence of evidence of a special agreement or arrangement, either with the writer of the message or between each other, will be liable for his own acts, but not for the acts and default of the other; *Baldwin et al. v. U. S. Tel. Co.*, 4-542.

30. **DEGREES OF NEGLIGENCE.** The distinctions of negligence, formerly observed, as slight, ordinary and gross, are, at the present day, looked upon with disfavor, as being of doubtful utility, when applied in practice; *W. Un. Tel. Co. v. Eyser*, 5-161.

31. **CONTRIBUTORY NEGLIGENCE.** In an action, against a telegraph company, to recover for injuries resulting from the act of defendant's servants, in suspending a wire over or across a public street, in a city, the plaintiff's right is not affected by his having contributed to the injury, unless he was guilty of some wrongful act or culpable negligence. Therefore, held to be correct, to bar recovery, the court should charge it must be established "that the plaintiff did not, on the occasion complained of, omit to exercise such effort and caution, to avoid the accident and injury, as a man of ordinary prudence and circumspection, placed in the same circumstances, would have exercised," and this is the measure of the plaintiff's burden of proof, in this respect. *Id.*

32. **BURDEN OF PROOF.** Where a telegraph company has properly limited its liability, in the transmission of a message, the plaintiff, to recover, must prove some thing more than mistake and damage; he must show that the mistake was caused by the fault of the company, and that it might have been avoided if the company's instruments had been good ones, and if its agents had possessed the requisite skill and exercised the proper care and diligence, in respect to the transmission and receipt of the message; *Sweetland v. Ill. & Miss. Tel. Co.*, 3-306.

33. —. An error in transcribing the direction and a conse-

quent mis-delivery of a message delivered for transmission by telegraph, are prima facie evidence of neglect and want of care in the operator and casts the burden upon the company of explaining the error and showing that it occurred without fault; at least, this is so if the message is received for transmission unconditionally; *Baldwin et al. v. U. S. Tel. Co.*, 4-542.

34. **INSTANCE.** B. delivered to an agent of a telegraph corporation a message to be transmitted to Lebanon, Boone county, Indiana. The agent forwarded it to West Lebanon, Warren county, Indiana, but not to Lebanon. Upon trial of an action to recover a statutory penalty for the non transmittal of the message, the operator testified, "I sent it to West Lebanon, Warren county; I did not know of the other place at the time." The supreme court of Indiana held it to be gross negligence, on the part of the company, that it should employ an operator who did not know of the existence of a town which was the county seat of a neighboring county, it being one of the stations on the line of the company; *W. Un. Tel. Co. v. Buchanan*, 4-372.

35. **NEGLIGENCE; BURDEN OF PROOF.** In an action to recover damages of a telegraph company for an error in the transmission of a message, in the absence of any rule or contract fixing the company's liability, the plaintiff makes out a prima facie case by proof of the undertaking to deliver, error and damage. The burden rests upon the company to show that the error was caused by some agency for which it is not liable; *W. Un. Tel. Co. v. Tyler et al.*, 5-317.

36. **LIABILITY; PRIMA FACIE CASE.** In an action to recover damages of a telegraph company for an error in the transmission of a message, in the absence of any rule or contract fixing the measure of liability, the plaintiff makes out a prima facie case by proof of the undertaking, error and damage, and throws the burden upon the company to show that the error was caused by some agency for which it is not liable; *Bartlett v. W. Un. Tel. Co.*, 5-406.

37. **MEASURE OF DAMAGES.** Where the import of a telegraphic message is wholly unknown to the company's agent, to whom the same is delivered for transmission, it being in cipher, it can not be assumed he had in view any pecuniary loss to the sender, as the natural or probable result of a failure to send such message; and, in such case, upon a breach of the contract to transmit and deliver, the sender can recover only nominal damages, or the amount paid for sending the message; *Candee v. W. Un. Tel. Co.*, 5-633.

TELEPHONE COMPANY.

1. **MEANING OF WORD IN THE STATUTE.** The word "telephone," as used in the act of April 13, 1885, was intended to designate and did in fact refer to an apparatus composed of all

the necessary and usual instruments for the transmission and reception of telephonic messages, and not to a single instrument only; *Hockette v. State*, 10-349.

2. A TERM OF ART. The word "telephone" having become a term of art, evidence is admissible to explain its proper meaning. *Id.*

3. PATENTED CONTRIVANCES. The fact that appliances of the telephone are protected by letters patent of the United States, giving, to the owner of the patent right, an exclusive right to the use of the patented appliances, does not preclude a state from regulating the right to use them within its borders. *Id.*

4. STATE CONTROL OF RATES. The state has the right to prescribe the maximum rate of charges which a telephone company may demand for the use of its instruments. *Id.*

5. —. In contemplation of law, all the instruments and appliances used by a telephone company, in its business, are devoted to public use. Property, thus devoted, becomes a legitimate subject of legislative regulation. To prescribe maximum rates of charges for the use thereof is not to take property for a public use within the meaning of the constitution. *Id.*

TENANTS IN COMMON.

1. PURCHASE OF OUTSTANDING TITLE BY ONE. It is a general rule that one tenant in common can not buy in an outstanding lien and build a title upon it; but, when their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, especially when the co-tenants are not in joint possession of the premises; *Elston v. Piggott*, 8-313.

TENDER.

1. APPLICATION OF DOCTRINE. The doctrine of tender applies only when a person who desires to avoid a fraudulent contract has received some benefit under it which he is able to restore and can so place the other person in statu quo. It does not apply as between the receiver of a corporation, representing stockholders and creditors, and a third person who has possession of corporate assets under a voidable contract with the trustees; *Guild, exec'r etc., v. Parker, rec'r etc.*, 8-401.

2. PAYMENT OF LICENSE TAX. The ordinance of the corporation provided that certain certificates of indebtedness shall be received in payment of all other taxes. Held, that they were not sufficient as a tender of payment of a license tax; *City of East St. Louis v. Wehring*, 2-148.

3. LICENSE; CITY ORDERS. An ordinance required merchants engaged in the sale of goods to procure a license, and imposed a

penalty for its violation. It also provided that only currency of the United States or city orders should be received in payment therefor. A tender was made in payment for such a license in certificates of indebtedness issued by the police commissioners. Held, (1) that the certificates of indebtedness were not city orders in contemplation of the ordinance, and the tender was properly refused; (2) that the fee required for the license was not a tax, and that an order making the certificate a sufficient tender in payment of taxes did not make them a tender in payment for licenses; *City of East St. Louis v. Wider*, 2-142.

See SUBSCRIPTION FOR STOCK.

TORT; see CONSOLIDATION; DAMAGES; LIABILITIES; LIBEL; MALICIOUS PROSECUTION.

TRADE MARK.

1. EQUITABLE JURISDICTION. Courts of equity will afford relief, in cases of infringement on the rights of property in trade marks — as a corporate name — on the ground of the injury to the party aggrieved and the imposition on the public, independently of the question whether there be any fraud or evil intent; *Holmes, Booth & Haydens v. The Holmes, Booth & Atwood Manuf. Co.*, 3-210.

2. —. Where the name of a manufacturing corporation has been used, to designate the origin and ownership of the goods manufactured by it, such use of its name will be protected, on the same principle and to the same extent, that individuals are protected in the use of trade marks. *Id.*

TRANSFER BOOKS; see DIVIDEND.

TRANSFER OF STOCK.

1. INDORSEMENT. Indorsements in blank, on certificates of shares of stock, are perfectly regular; *Walker v. Detroit Transit Ry. Co. et al.*, 7-582.

2. EVIDENCE OF OWNERSHIP. Possession of certificates of corporate stock, which bear proper indorsement authorizing transfer, is prima facie evidence of ownership; and the holder for value, without notice of prior equities, takes a perfect title as against such equities. *Id.*

3. ESTOPPEL. If the rightful owner of shares of stock has invested another with the usual evidence of title, or an apparent authority to dispose of the stock, he will be estopped from making any claim against an innocent purchaser dealing on the faith of such apparent ownership, or right of disposal. *Id.*

4. INNOCENT PURCHASER. A purchaser has a right to assume that the indorsement for the transfer, of certificate of shares, being by the official whose functions would naturally and reasonably

include the act of appending it, is well grounded and preceded by all needful circumstances. It is not incumbent on such purchaser, to seek a verification of the assumption by inspection of the corporate books before purchase. *Id.*

5. **AS AGAINST THIRD PERSONS.** Under statute of Louisiana (Rev. Civ. Co., § 3, 158) pledges of stock in a corporation are valid against third persons by mere delivery of the certificates. This, too, although the certificates declare the stock to be transferable on the books of the company, without expressly requiring surrender of such certificates; *Factors & Traders Ins. Co. v. Marine Dry Dock & Ship Yard Co.*, **1-236**.

6. **NOT ON BOOKS.** A transfer of corporate stock may operate to convey the interest of the holder even though not recorded upon the books of the association. A judgment creditor who buys at an execution sale, with knowledge of such transfer, takes no thing that the debtor himself could not claim; *Newbury v. Detroit etc. Manuf. Co.*, **3-472**.

7. —. Except as between the parties a transfer of mining stock is not valid, in Nevada, until the same shall have been entered upon the books of the corporation, so as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer; *State of Nevada, ex rel. Guerrero, v. Pettinelli et al.*, **5-516**.

8. —. A transfer of stock in a corporation not entered upon the books of the company, as required by statute, is valid against all the world, except subsequent bona fide purchasers; *People, ex rel. Mead, v. Elmore*, **1-229**.

9. **EFFECT OF.** Shares of stock in a corporation, in a certain sense, represent an interest in the corporate estate, and a conveyance thereof is a conveyance of such interest; but, it is not a particular interest in particular property, but, simply an interest in the rights and property of the corporation, whatever they may be, and subject to the corporate obligations; *State of Louisiana v. North La. & Texas R.R. Co.*, **9-368**.

10. **WARRANTY OF.** The transfer of stock, without representation or specification as to the particular property held by the corporation, warrants only the title to the stock, and not the title of the corporation to the property held by it. *Id.*

11. —. In the absence of fraudulent concealment or misrepresentation, failure of title of the corporation to its property, furnishes no ground for action of nullity, of transfers of stock, based on error or breach of warranty. *Id.*

12. **LIS PENDENS.** The doctrine of *lis pendens*, so far as it maintains that the mere pending of an action concerning the title to stocks, is constructive notice to all mankind, and that a purchaser acting in good faith is bound by the results of the action, is no part of the law of the state of New York; *Holbrook v. New Jersey Zinc Co.*, **4-637**.

13. **TRANSFER; EFFECT.** Where the statute of incorporation provides that stock shall be transferable only on the books of the corporation, a transfer of stock, until entered on the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered; *People v. Robinson*, 10-59.

14. **BONA FIDE SALE; EFFECT OF.** The bona fide sale of the stock of an incorporated company coupled with the power of attorney, to the vendee, to transfer it on the books of the company is made complete by the delivery, to the vendee, of the certificate of stock. It is not necessary to the making perfect of the sale and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer of the stock should have been made on the books; *Smith v. Crescent Live Stock Landing etc. Co.*, 7-226.

15. **VENDOR AND VENDEE.** The purchase of stock is, of itself, authority in the vendor to make a legal transfer thereof, to the vendee, on the books of the company; *Webster v. Upton, ass'e*, 5-120.

16. **ASSIGNMENT.** The assignment of the certificate of shares of stock is only an equitable transfer, and must be produced to the corporation that transfer be made; *Bank of Commerce's Appeal*, 5-603.

17. **EFFECT OF ASSIGNMENT.** One who takes an assignment of a stock certificate, as between him and the transferor, takes the whole title, both legal and equitable; *Holbrook v. New Jersey Zinc Co.*, 4-637.

18. **DELIVERY WITH POWER TO TRANSFER.** The rule is well settled that one who takes a certificate of stock, with the usual power of attorney, as between him and the transferor, takes the whole title, both legal and equitable; and it makes no difference that the blanks are not filled up; *Cutting, jr., rec'r etc., v. Damerel*, 9-618.

19. **BLANK ASSIGNMENT AND POWER.** An assignment and power of attorney authorizing a transfer of stock upon the books of a corporation were executed in blank. Subsequently the name of a plaintiff, suing to compel a transfer, was inserted and the name of another was inserted as the attorney. It was not essential that demand for a transfer should be made by the attorney; *Cushman v. Thayer Manuf. Jewelry Co.*, 8-569.

20. **INNOCENT PURCHASER; INSTANCE.** The charter of a banking corporation empowered the directory to make all needful rules and by-laws, for the management of the company's business and property "and the mode and manner of transferring its stock." The corporation enacted a by-law, providing that the stock of the company should be assignable only on the books of the company and

no transfer of stock should be made by any holder thereof who should be indebted to the company, and it required certificates of stock to contain upon them notice of this provision. Certificates of stock duly authenticated, issued to C. reciting the number of shares, represented their value at par and that they were "transferable at the office, in person or by attorney." C. borrowed money upon these certificates, as collateral security, assigned them in form and signed a power of attorney to transfer. A demand for transfer on the corporate books was refused and suit brought for damages by reason of such refusal. The corporation defended on the ground that C. was indebted to it and that under its by-law, it had a lien on the stock and that the same could not be transferred. At the time of the assignment P. had no actual notice of the lien claimed by the corporation. The court held that P. did not have constructive notice by the charter that there would be a by-law adopted preventing a stockholder indebted to the company from disposing of his stock; but, only that there would be some regulation of the mode and manner of making the transfer and she had a right to presume that such regulation was announced by the words, "transferable at the office, in person or by attorney," which appeared on the face of the certificates; and, she was not obligated to make any further inquiry. Wherefore, P., being an innocent purchaser for value, without notice of any lien of the corporation on the stock, if any it had, she is protected, to the extent of her loan, interest and reasonable attorney's fees, in accordance with the contract of loan; *Bank of Holly Springs v. Pinson*, 8-69.

21. **EQUITY NOT RELIEVE ASSIGNOR AGAINST BONA FIDE SALE.** A court of equity will give the assignor no relief against the bona fide sale of stock in a corporation merely for the reason that the assignor may have failed to have the stock transferred to him upon the books of the corporation, as required, by law. It is no concern of the assignor whether the assignee ever becomes invested with the legal title, or the right of membership in the corporation. Such stock may be regarded as a chose in action, the equitable title of which, as between the parties, may be transferred without observing the requirements of the charter or by-laws of the company as to the mode of transfer so as to pass the legal title; *Otis, adm'r, v. Gardner et al.*, 9-199.

22. **ESTOPPEL OF TRANSFEROR.** One who has transferred a certificate of shares of stock for value, can not afterward, in his own defense, object to the transfer on the ground that it was not made in the mode prescribed by the corporate by-laws or charter; *Home Stock Ins. Co. v. Sherwood*, 8-268.

23. **TRANSFER; CERTIFICATE.** One who takes, in good faith for a valuable consideration and without notice of any trust, stock in a corporation, is not bound to examine the books of the corporation, or to look beyond the certificates which are assigned to

him, to ascertain the validity of former assignments; *Salisbury Mills v. Townsend et al.*, 4-443.

24. **EQUITABLE TITLE.** W., who owned stock in a corporation — a national bank — transferred it to H., to hold in trust for her. A new certificate issued to H., in which the stock was declared to be transferable only on the books of the corporation, by him or his attorney, on the surrender of the certificate. The corporation had no notice of the trust. H. indorsed upon this certificate an assignment to W. and delivered it to her. The stock continued to stand in the name of H. on the books of the bank, he voted on it and received dividends thereon, which he paid to W., and acted as shareholder. H. became insolvent and an assignee in insolvency was appointed. The stock had been previously attached by a creditor of H. and an order was, thereafter, made, on the application of the assignee and the creditor, under provision of statute (Gen. Stat., Mass., ch. 118, § 4) that the lien created by the attachment should continue. W., afterward, offered to surrender the certificate to the corporation and demanded a transfer of the stock to herself. The by-laws of the company provided that the stock should be assignable only on its books and that a transfer book should be kept in which all assignments and transfers of stock should be made. A bill in equity was presented by W. against the bank, to compel a transfer of the stock. The court held that the stock did not pass to the assignee in insolvency of H.; that the attachment was dissolved; and, that W. was entitled to the transfer; *Sibley, admx., v. Quinsigamond Nat. Bk. et al.*, 9-442.

25. **PASSING EQUITABLE TITLE.** The charter of a private corporation provided that the stock of the company should be transferable in such manner as the directors might determine, and the by-laws of the company provided that the secretary should keep a book upon which all transfers of stock should be made by the holder or holders, or by his or their attorney, duly constituted in writing. The legal holder of certificates of stock in the company on a loan thereof, transferred and delivered the same, with a blank assignment and power of attorney indorsed thereon, to the borrower, which power of attorney authorized the assignee to have the stock transferred on the books of the company, but no such transfer was ever made on the books. The certificates, in this condition, were transferred by the borrower as collateral security for a note given for the loan of money by a third person, which note was indorsed by the borrower of the certificates. While the legal title never passed by the transfer of the certificates, for want of an assignment on the books of the company, yet, after the pledge by the holder under such blank indorsement to an innocent party without notice of the rights of the original holder, the pledgee acquired an equitable title to the same as a security for the money loaned by him, of which he could not be divested by

the original owner or his administrator; *Otis, adm'r, v. Gardner et al.*, 9-199.

26. **ASSIGNEE HOLDING EQUITABLE TITLE.** Where certificates of stock in a private corporation are assigned in blank, with a power of attorney authorizing the transfer of the stock on the books of the corporation, with no limitation as to their use by the assignee, the assignee or holder will be authorized, as to persons dealing without notice of any defect of power in him, to make any legitimate use of them a rightful owner might, and a sale or pledge of such certificates by him, in the usual course of business, to a party taking in good faith for value, will be valid and binding on the original owner or assignor, though the legal title may not have passed, for want of a transfer on the books of the corporation. *Id.*

27. **ASSIGNMENT; ATTACHMENT.** An owner of stock in a manufacturing corporation, and holder of a certificate thereof in his own name, delivered the certificate, with a printed assignment in blank, signed by him, indorsed upon it, to A., for the purpose of transferring the stock to him as collateral security for a debt. While A. so held the certificate, and before the assignment had been filled out, and before notice of the assignment had been given to the corporation, the stock was attached by B., who had no notice of the assignment, as the property of the assignor. The certificate contained on its face the words "Transferable only on the books of the company, in person or by power of attorney, on surrender of this certificate." Held, on a bill in equity, that, under the statute of 1870, ch. 224, p. 26, B. was entitled to hold the stock as against A.; *Central National Bank v. Williston*, 10-584.

28. **SURVIVOR OF PARTNERSHIP.** On the dissolution of a partnership owning stock in a corporation, the retiring partner selling out his interest to his co-partners and these assuming all the debts of the firm, as the successors of the original partnership, these latter become the original owners of the stock; *Planters & Merchants Mutual Ins. Co. v. Selma Savings Bank*, 6-171.

29. **PURCHASER.** Bona fide purchaser of railroad stock, for value, and without notice, protected; *Stinson by next friend, v. Thornton, adm'r*, 6-353.

30. **POWER TO TRANSFER.** A power of attorney to transfer a certificate of stock, being signed, is not incomplete because blanks are left in which to insert the number of shares and the name of the attorney. Any holder may fill up the blanks and constitute himself attorney; *Holbrook v. New Jersey Zinc Co.*, 4-637.

31. **POSSESSION; DELIVERY.** A purchaser from one, other than the original stockholder, who receives a certificate of stock, duly assigned with power of attorney in blank, in an action against the corporation, whose stock it is, for refusal to transfer the stock on its books, is not bound to show affirmatively the title of his immediate assignor. Delivery is to be presumed from the fact that

the certificate, properly indorsed, is in the possession of the holder. It must be supposed that the ordinary course of business was followed. *Id.*

32. **TRANSFER; GUARANTY OF TITLE.** The corporation does not, in the absence of fraud or collusion, become the guarantor of a vendor's title to shares of its capital stock by permitting it to be transferred on its books, in the manner prescribed by its charter; *Central R.R. etc. Co. v. Ward et al.*, 1-299.

33. **TRANSFER BY EXECUTOR.** An executor of a will, unless there is some thing in the will restricting his general authority as executor, has power to dispose of stock of his testator, and the corporation accepting the transfer of stock from such executor, is not bound to inquire further as to his authority; *Crocker v. Old Colony R.R.*, 10-572.

34. **RETAINING EVIDENCE OF AUTHORITY.** A corporation has no right to require that certified copies of a will and appointment as executor, which were presented for its inspection upon application of the executor for a transfer of stock standing in the name of his testator, shall remain in the custody of the corporation; *Bird v. C. & I. N. R.R. Co.*, 10-575.

35. **REFUSAL TO TRANSFER.** A corporation is entitled to refuse the demand of the equitable owner of shares for the transfer of stock, where he does not offer to surrender the certificates, but they are known to the officers of the company to be in possession of another person, who claims to be their lawful owner; *National Bank of New London v. Lake Shore & Michigan Southern Ry. Co.*, 4-13.

36. —. A notice that the title and right of the holder of shares of stock are disputed and that legal proceedings will be instituted to test the questions, may be sufficient to justify a suspension of the act of transfer demanded, that proper opportunity be afforded for such an appeal to the courts; but, it can not operate to justify a delay persisted in when, full time having been allowed for access to the courts, it has not been made to appear that any process to enjoin has been granted; *State, ex rel. Townsend etc., v. M'Iver et al.*, 4-160.

37. —; **LIABILITY.** A corporation is liable, in an action on the case, for refusing to transfer, on its books, shares of its capital stock, which it has issued to a purchaser of the same, unless the stock is absolutely void for fraud and want of consideration. In the latter event no action will lie against the company for such refusal; *Protection Life Ins. Co. v. Osgood*, 6-439.

38. —. In the absence of a legislative enactment restricting the transfer of stock to a particular mode, the transfer is complete on delivery of the certificate with power to transfer and payment of the purchase money, not only as between vendor and vendee, but, when the corporation has unjustifiably refused to make the transfer on its books, against a creditor of the vendor, who, with-

out notice of the transfer, attaches the stock; *Merchants National Bank v. Richards*, 8-282.

39. REFUSAL TO TRANSFER; LIABILITY. If a corporation shall have issued a certificate of stock to a person as trustee and on his death, being requested by the person claiming to be entitled to the stock, shall refuse to examine the evidence offered and permit a transfer, without a decree of court on a bill in equity against it to compel a transfer, and it shall appear that the corporation could easily have satisfied itself of the truth of the claim of ownership, it may be ordered to pay the costs of suit as well as to make the transfer; *Iasigi, adm'r, v. C. B. & Q. R.R. Co. et al.*, 7-515.

40. EQUITY WILL COMPEL. An equitable action will lie to compel a transfer on its books, by a manufacturing corporation, of shares of its capital stock, to the owner of the same; *Cushman v. Thayer Manufacturing Jewelry Co.*, 8-569.

41. —. Such an action is proper where a recovery of damages, for a refusal to transfer the stock, will not furnish an adequate compensation. *Id.*

42. INSTANCE. The husband of plaintiff, P., executed an assignment and power of attorney, indorsed upon a certificate of shares of defendant's stock and delivered the same to plaintiff, without consideration. Thereafter, P. executed, for a valuable consideration, an assignment of said stock to one B. and caused the same to be transferred to him, on defendant's books. By the terms of the certificate the stock was transferable, upon the corporate books, only on surrender of the certificate. B. knew of the assignment to plaintiff and was a witness thereto; he was also an officer of the corporation. Plaintiff, after the transfer to B., presented the certificate to defendant and demanded a transfer on its books, which defendant refused. An equitable action could be maintained and the prior transfer was not a valid excuse for the refusal, inasmuch as it was defendant's duty to resist any transfer without production and surrender of the certificate and the fact that the assignment to plaintiff was without consideration was immaterial, as the delivery of the certificate with the assignment, as between plaintiff and P., passed the entire legal and equitable title to the stock. *Id.*

43. DEFENSE OF REFUSAL TO TRANSFER. In an action on the case, by a purchaser of stock in an incorporated insurance company, against the company, for refusing to transfer the stock on its books, the company offered to prove that when the subscription was made, checks were given by the parties subscribing for the amount of the stock, which the company agreed to hold until the state treasurer should accept certain notes secured by mortgage which were given to the company in payment for the stock, and that after the treasurer had passed upon and accepted the securities as a part of the guaranteed fund, the checks were returned; and that, subsequently, the securities were discovered to be of little

or no value, and upon notice being given to one of the subscribers, he gave other securities, that also proved to be of little or no value. This evidence the court refused to admit. The proofs showed that the company still held all these securities, and there was nothing to show that the subscribers had acted fraudulently. Held, that there was no error in refusing to admit the evidence; *Protection Life Ins. Co. v. Osgood*, 6-439.

44. **WAIVER OF OBJECTIONS.** A demand for the transfer of stock on the books of a corporation, and a refusal by the officer upon whom the demand is made to comply therewith, with a statement of a specific reason for such refusal, is a waiver of all other objections to the transfer; *Bond v. Mount Hope Iron Co.*, 1-618.

45. **STATUTORY REQUIREMENTS.** A general statute enacts that the stock of corporations organized under it shall be transferable only on the books of the corporation, in such form as the directors prescribe. Provisions of this kind are intended solely for the protection and benefit of the corporation. They do not incapacitate a shareholder from transferring his stock, without any entry upon the corporate books. Except as against the corporation, the owner and holder of shares of stock may, as an incident of his right of property, transfer the same as any other personal property of which he is owner; *Baldwin et al. v. Canfield*, 7-641.

46. **STATUTE INTERPRETED.** The provisions of statute of Illinois, in regard to the transfer of shares of corporate stock and making the same subject to levy and sale on execution, contemplate that, as against a judgment creditor, the title to such stock shall only pass by transfer on the corporate books; *Peoples Bank of Bloomington v. Gridley et al.*, 6-435.

47. **BY-LAW REGULATING.** A by-law prohibiting the transfer of stock when the stockholder is in arrears, in answering calls on his unpaid stock, and, also, when he is otherwise indebted to the bank, outside of his original subscription, is reasonable and not inconsistent with general law; *Kahn v. Bank of St. Joseph*, 8-232.

48. —. A by-law which should prohibit the transfer of stock merely because it is not fully paid up, when all calls upon it have been paid, would be unreasonable. *Id.*

49. **INSTANCE.** A by-law of a corporation — a bank — declared "no transfer of stock shall be allowed or valid, so long as the holder is in arrears to the bank or, in any form, indebted to it." The organic act of the corporation provided, "no shares shall be transferred until all previous calls thereon shall have been fully paid in." The by-law could not be so construed as to prohibit the transfer of any stock on which all previous calls have been paid. The word "arrears," in the first clause, refers to unpaid calls and the phrase "in any form indebted," in the latter clause, refers to indebtedness outside of the stock subscription. It was not, there-

fore, justifiable on the part of the corporate officers to refuse assent to a transfer of shares on the ground that thirty per cent. only of the par value of the shares had been paid, no other instalments having been called for by the directors. *Id.*

50. REGULATION OF. Quære, whether a court may not assume that a stock corporation has prescribed rules and formalities to be observed before it will be compelled to recognize and act upon a lawful transfer of title to shares of its stock; *Burrall v. Bushwick R.R. Co.*, 8-554.

51. —. A by-law restricting the transfer of stock, by declaring no transfer of shares shall be made, or be valid, if made, until entry of such transfer upon the books of the corporation is necessary to the interests of the corporation and reasonable; *Farmers & Merchants Bk. of Lineville v. Wasson*, 6-538.

52. —. A by-law making the validity of a transfer of stock depend upon the approval and acceptance of the directors of a corporation can not be enforced, by courts, in a case where the corporation has no rights to be protected by its exercise and other parties would be deprived of their property. *Id.*

53. —. Rules which corporations may have adopted for the transfer of their stock must be observed, but, when a compliance with those rules is offered, the officers of such associations are not at liberty to inquire into the motives of the seller and the vendee, the purpose which prompts the sale, or what will be the effect, either as to themselves or some friendly company. Nor, if the formalities which they have prescribed as to the law which is to govern on such transfer are complied with, can they withhold the proper action demanded of them, no matter what may be the equitable interests of others who, with notice of the sale, have yet not taken any legal measure to prevent it; *State, ex rel. Townsend etc., v. M^rIver et al.*, 4-160.

54. —. In the absence of any by-law with respect to the sale of stock in an incorporated company, a regulation as to such transfer, incorporated into the certificate and established by long usage, may well be recognized as the law of the corporation in the matter. The mode of the transfer thus indicated has become a part of the contract with the holder. *Id.*

55. —. A by-law of a corporation "that shares shall be transferable by indorsement in writing, and subscribed by the holder in presence of the cashier, or two other witnesses" etc., is both lawful and salutary, and its substantial observance must be upheld; *Dane et al. v. Young et al.*, 4-425.

56. —. Transfers of stock which have not been entered on the books of the company, as provided in the statute, are, nevertheless, valid as against all the world, except purchasers in good faith without notice; *Parrott et al. v. Byers et al.*, 4-282.

57. CONSTRUCTION. The national bank act provides that the stock shall be transferable on the books of the association in such

a manner as may be prescribed by its by-laws. Such provision is designed for the security of the corporation itself and of third persons taking without notice of any prior equitable transfer and as relating to the legal title and not to any equitable interest subordinate to that legal title; *Sibley, adm'r, v. Quinsigamond Nat'l Bk. et al.*, 9-442.

58. COMPLIANCE WITH BY-LAW. The by-laws of a corporation regulated the mode of transferring stock and defined the rights and liabilities of transferror and transferee and the rights of the corporation in the event of transfer. The legal title to stock transferred can not pass unless the mode of transfer prescribed is observed; but, a complete equitable title may be acquired by a transfer in any form, or manner, appropriate to pass property of that kind, divesting the stockholder of all right and interest, and entitling the transferee to demand that he be invested with the legal title; *Planters & Merchants Mutual Ins. Co. v. Selma Savings Bank*, 6-171.

59. —. The by-laws of a corporation providing that transfers of stock should only be made on surrender and cancellation of the original certificate is binding on stockholders and their heirs; wherefore, before the latter can justly demand transfer to them of their ancestors' stock or the payment of accrued dividends, they must comply with the requirements of the law governing them; *State, ex rel. Martin et al., v. New Orleans etc. R.R. Co.*, 7-208.

60. WAIVER AND REPEAL. Under a charter, granted, the directory was empowered to make by-laws etc. for the control and management of the business and affairs of the company, its property and the mode and manner of transferring its stock. It having been the uniform course of the corporation to issue certificates of stock which did not contain a notice required by the by-law, providing for a lien on the stock, such uniform course of conduct must be regarded, at least as to all persons not members of the corporation, as making a by-law repealing that providing for a lien as to any particular certificates issued not containing such notice; *Bank of Holly Springs v. Pinson*, 8-69.

61. PRIVATE SEAL. If the by-laws of a corporation require a transfer of stock to be under seal, a transfer signed in blank with the word "seal" inclosed in a bracket is of no effect; *Bishop v. Globe Co.*, 9-468.

62. AS TO THIRD PERSON. Where, by express provision of the charter of a corporation, the board of directors is empowered to provide for the mode of transferring shares of the capital stock of the company, and, in the exercise of this power, it by by-law provides that such transfer shall only be made upon the corporate books, in custody of the secretary, upon presentation of the certificate of shares, properly indorsed, a transfer, by delivery and indorsement only, will not be valid as against a creditor of the as-

signor of stock who levies his execution, upon such shares, without notice of the transfer; *Peoples Bank of Bloomington v. Gridley et al.*, **6-435**.

63. **ASSIGNOR AND ASSIGNEE.** As between the vendor and vendee of shares of corporate stock, which, by charter or by-law of the company, are required to be transferred by surrender of the stock certificate and entry upon the corporate books, a sale and transfer will be good without entry upon such books, will be enforced in chancery, and vendee will be required to pay subsequent assessments, or indemnify vendor against their payment. *Id.*

64. **TRANSFER TO COMPANY; NOT EXTINGUISHED.** Shares of stock in a corporation are not necessarily extinguished by being transferred so that they can not be re-issued; *Commonwealth v. Bost. & Alb. R.R. Co.*, **10-607**.

65. **INSTANCE.** Under a statute providing that the treasurer of the state should assign to a corporation therein named, all the shares of the capital stock of such corporation which were owned by the state etc., in exchange for certain bonds of the corporation, and that thereupon the corporation shall hold and dispose of the shares of stock so assigned to it, as its absolute property, held, the corporation might divide such shares among its stockholders. *Id.*

66. **DUTY OF COMPANY.** To allow stock, the certificates of which are held by a bona fide holder, to be transferred to another without his consent, is a breach of corporate duty by the bank, for which an action will lie; *First National Bank v. Lanier*, **3-74**.

67. —. When a transfer of its stock is presented to a corporation, it is bound at its peril to see that it is a genuine transfer by one who has the power of disposition over the stock; *Crocker v. Old Colony R.R. Co.*, **10-572**.

68. **UNAUTHORIZED TRANSFER.** If the corporation issues a new certificate upon a forged or unauthorized transfer, the real owner retains his property in the stock, and the corporation may also be liable to a bona fide holder of the new certificate. *Id.*

69. **IRREGULAR.** Equity will protect the claims of the holder of stock irregularly transferred; and, if the corporation goes into liquidation, will authorize it to enforce a stock note given by the transferror in payment of the stock, in order to provide means for its redemption; *Home Ins. Co. v. Sherwood*, **8-268**.

70. **ILLEGAL; RIGHT OF STOCKHOLDER.** In case of an illegal or unauthorized transfer of stock, the stockholder may contest the title of the transferee contradictorily with both the latter and the corporation, but he is not confined to this remedy. He may sue the corporation for the value of his stock illegally transferred; *Woodhouse v. Crescent Mut. Ins. Co.*, **10-472**.

71. **TRANSFER FOR ILLEGAL PURPOSE.** The holder of stock, issued to him without payment or consideration, surrendered his certificate to a co-conspirator to be used, as to a part of the shares

it represented, in corrupting officials. It was, to the extent agreed upon, used in that way. The officer of the corporation to whom it was thus surrendered failed to make return of the residue not so used. The agreement as to the delivery and the surrender of the original shares was illegal and void, wherefore an agreement to return the balance of the shares could not be enforced at law or in equity; *Tobey v. Robinson*, 6-505.

72. TO EVAD^E LIABILITY. It is well settled, in this country, that the transfer of shares of stock in a failing corporation, for the purpose of escaping liability as a shareholder, is void as to creditors and other stockholders of the company; *Rider v. Morrison et al.*, rec'rs etc., 7-415.

73. FORGED POWERS. A corporation may maintain an action against one who presents a forged power of attorney to transfer stock, on the faith of which the corporation issues to such person a new certificate of stock, although such person acted in good faith; *Bost. & Alb. R.R. Co. v. Richardson et al.*, 9-472.

74. —; DAMAGES. In an action by a corporation against one to whom it has issued a new certificate of stock on the faith of a forged power of attorney to transfer stock presented by him, the measure of damages will embrace: 1, the costs and expenses — not including counsel fees — of a suit brought against the corporation, by the person whose name was forged, to compel an issue of new stock to replace that transferred, the corporation having notified the defendant of that suit and requested him to defend it, which he refused to do; 2, the amount paid by the corporation for stock bought by it in good faith to replace that so transferred, although the stock was then of a higher value in the market than at the time the forgery was committed; 3, the dividends upon the stock which the corporation was obliged to pay the person whose name was forged. *Id.*

75. —; JURISDICTION OF EQUITY. A certificate of shares in the capital stock of a corporation was taken, without the owner's knowledge and, together with a forged power of attorney to transfer, delivered to a broker for sale. The broker employed an auctioneer, who sold the stock to a purchaser. The broker then sent the certificate with the forged power to the corporation, requesting a new certificate in the name of the purchaser. The corporation made the transfer and sent the new certificate to the auctioneer who delivered it to the broker with power of transfer. The broker in turn delivered to the purchaser, to whom the corporation afterward issued a new certificate. These parties, the broker, auctioneer, and purchaser and corporation, acted in good faith, each supposing the power of attorney authorizing transfer to be genuine. The original owner then exhibited a bill in equity against the corporation and obtained a decree ordering it to procure and transfer to her, complainant, the shares of stock and to make and deliver a certificate of the same. The corporation, in

obedience to the decree, issued a certificate for the shares and thereby increased its capital stock. It then filed its bill in equity, against the broker, the auctioneer and the purchaser, setting forth the above facts and praying for relief, by surrender of the outstanding certificate and the re-payment to the purchaser of the price paid by the parties through whose hands the purchaser's money passed. The bill could not be maintained; *Machinists Nat. Bank v. Field et al.*, 7-486.

76. FORGED POWERS; JURISDICTION OF EQUITY. A bona fide purchaser who has paid full consideration without knowledge of another's title to, or the forgery of such other's name to, the power of attorney by means of which the certificate of shares of capital stock in a corporation has been negotiated and who does not hold the original certificate, but a new one issued to him on transfer made upon the books of the company is not a proper party defendant, to a bill in equity, by the owner of the shares wrongfully transferred to compel the issue of a new certificate, and no decree can be made against him. His rights depend upon the effect of the new certificates delivered to him; *Pratt, ex'r, v. Taunton Copper Manuf. Co.*, 7-470; *Pratt, exec'x, v. Machinists Nat. Bank*, 7-470.

77. ALTERED ASSIGNMENT. It was charged that the assignor of certificates of stock, held them as custodian of and for his assignee; that at the time the power of attorney authorizing transfer was filled out with the name of assignee; that subsequent to the death of assignee an alteration was made in this respect, and the name of another was inserted as assignee of the certificates. Such an alteration would be entirely unauthorized and would convey no title. The act was forgery and no title can be obtained through the medium of forgery; *Eaton v. New England Telegraph Co.*, 7-313.

78. —. Where a statute provides that an assignment of stock shall not be good, except as between parties, until the transfer is made upon the books of the corporation issuing the certificates it would seem that, in the absence of alteration or erasure, a bona fide purchaser for value without notice of a previous sale, would be entitled to hold the shares, albeit there was forgery. In such case if not to be aided by the forgery, he should not be injured by it. Whether he should be charged with notice would be a question of fact for the jury. *Id.*

79. CUSTODY OF SHARES. An assignee of certificates of shares of stock, to whom a transfer has been made by indorsement, on the back of the certificates, who leaves the certificates in the possession of his assignor, not having caused a transfer to be made on the books of the corporation issuing the certificates, is not, thereby, guilty of such negligence as to be estopped to set up his title against one who claims title to the certificates through an alteration of the assignments, by the fraud and forgery of the assignor. *Id.*

80. **PARTIES DEFENDANT IN EQUITY IN CASE OF TRANSFER UPON FORGERY.** Where a corporation has issued a certificate of shares of its capital stock, upon the surrender of a certificate formerly issued, evidencing the ownership of such shares, accompanied by a transfer under a forged power of attorney, neither the party who acted under such power, nor the person to whom the new certificate issued, is a necessary party to a bill in equity by the true owner, against the corporation, to compel it to procure a like number of shares of its capital stock; to record and to issue to him a certificate thereof and to pay him the dividends thereon; *Pratt v. Bost. & Alb. R.R. Co.*, 7-489.

81. **TRUST CREATED AND FOLLOWED.** D. transferred eighteen shares of stock in a manufacturing corporation to H., and took back an agreement, under seal, for a re-conveyance of the same on demand, in writing. H. transferred eight of these shares, in his life time, to a third person, at a time when he held ninety-two shares in his own right. At the time of his death he held one hundred and thirty-three shares in the same company and his estate was insolvent. The supreme court of Massachusetts held that the transfer and agreement created a trust in H., for the eighteen shares to be re-transferred to D. on demand in writing; that the transfer by H., of the eight shares, was in violation of his trust and equity would require him to replace them; and, as he held a sufficient number of other shares, at the time of the conveyance and at the time of his death, equity would treat him as holding them for D.; and, that the same result would follow if the agreement was treated as a contract by H. to convey eighteen shares to D. on demand, as they were fully paid for; and that D.'s remedy at law is inadequate because of the insolvency of H.'s estate; *Draper v. Stone*, adm'r, 7-334.

82. **WRONGFUL TRANSFER.** A corporation is liable for the damages caused by the wrongful cancelling of a certificate of its stock by its president and secretary; *Factors & Traders Ins. Co. v. Marine Dry Dock & Ship Yard Co.*, 7-236.

83. **LIABILITY FOR TRANSFERS MADE.** The owner of shares of the capital stock of a corporation, the certificate, evidencing the ownership, of which is taken from him without his knowledge or negligence and, by means of a forged power of attorney in his name, transferred, through intermediate parties, to a bona fide purchaser for value to whom the corporation has issued new certificates may maintain a bill in equity to compel the corporation to issue a certificate, to him, for the shares and to pay the dividends thereon; *Pratt, exec'x, v. Taunton Copper Manuf. Co.*, 7-470; *Pratt, exec'x, v. Machinists Nat. Bk.*, 7-470.

84. —. The officers of a corporation are the custodians of its stock books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If, upon the presentation of a

certificate for transfer, they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied with the genuineness of a power of attorney produced, they can require the identity of the party, in the one case, and the genuineness of the document, in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. Wherefore, when the name of the owner of certificate of stock has been forged to a blank form of transfer and the power to transfer and the purchaser of the certificate, so forged, obtains a transfer upon the books of the corporation, the company is held to the duty of replacing to the proper owner the shares or responding for the value with dividends past and accrued; *Telegraph Co. v. Davenport*, 6-55.

85. **LIABILITY FOR TRANSFERS MADE.** Nor is this affected by negligence of the guardian of minor children, legal owners of shares, in depositing the certificates for safe keeping, where they are within the reach of an insolvent relative. *Id.*

86. **AGENT FOR.** The person who acted in procuring transfers to be made, on the books of the corporation, was not an agent of the second purchaser and the latter was not affected by notice to him not communicated; *Stinson, by next friend, v. Thornton, adm'r*, 6-353.

87. **LIEN.** The provision of a charter, making the stock of a corporation private property and authorizing the board of directors to make rules and regulations concerning the transfer of the stock, subject to the general law of the state, authorizes the board to adopt a rule prohibiting the transfer of stock until all debts due by the owner of the stock, to the corporation, should be paid, although such rule may be inconsistent with the general law of the state, governing the transfer of personal property; *Mechanics Bk. v. Merchants Bk.*, 3-539.

88. **BONA FIDE CREDITOR PROTECTED AGAINST.** Bona fide creditors, as against whom transfer of stock certificates in private corporations are required to be registered on the corporate books, are judgment creditors who have acquired a lien. When the lien of an execution has attached before notice, actual or constructive, to the creditor, the purchaser at judicial sale will be protected although he had actual notice of a prior unregistered transfer; *Jones & Dunn v. Latham*, 9-16.

89. **LIEN OF CORPORATION.** Defendant is a corporation organized under act of February 5, 1853, authorizing the formation of corporations for manufacturing and other purposes in Michigan. The sixteenth section of that act provided that the corporation shall, at all times, have a lien upon the stock or property of its members invested therein for all the debts due from them to such corporation, which may be enforced by advertisement and sale in the manner provided in the act for selling delinquent stock. R. was apparently a stockholder of the corporation, 480 shares of

stock standing on the books in his name, he being, however, largely indebted to the company. An execution issuing against R., in favor of plaintiff, it was levied on said stock and the stock was sold to plaintiff for \$5. A copy of the execution and return of sale was left with the proper officer of the corporation and demand made for a certificate of the stock so purchased, which was refused, the company insisting on its lien and the plaintiff not tendering to cancel it. Thereafter the corporation proceeded by notice, advertisement and sale, under the statute, to purchase the stock to re-imburse itself to the extent of its lien; shortly after cancelling the old and issuing new certificates, to the president of the corporation for its use. Four years, thereafter, complainant demanded an account of the stock bid off in the execution, of dividends, increase and profits, and the issue to him of a certificate of said stock, offering to pay any lawful lien the company had thereon. This request being refused, the bill was filed. Held, that the statutory lien upon the stock, possessed by the corporation, was not displaced, over reached or impaired by the institution of the lien under the execution or by the sale of the stock under it. Complainant, in order to acquire any rights as a purchaser at the execution sale, should have paid, or offered to pay, the prior lien of the company within a reasonable time; *Newbury v. Detroit etc. Manuf. Co.*, 3-472.

90. **BANKS' LIEN ON ABOLISHED.** After the repeal of section 36 of the currency act of 1863, national banks could assert no lien upon stock to secure a debt to the bank by the owner thereof; *First Nat. Bk. of South Bend v. Lanier*, 3-74.

91. **ESTOPPEL.** If a corporation has a lien on stock, for a debt, due the corporation, from a stockholder, it is not estopped to assert such lien by the fact, that, on the stockholder's presenting the certificate for transfer to the person in charge of the transfer book, the latter promised to make the transfer and issue a new certificate so soon as a certain officer returned; *Bishop v. Globe Co.*, 9-468.

92. **WAIVER OF LIEN.** A by-law of a corporation provided, among other matters, that "no transfer of the stock of the association shall be made by any stockholder who shall be liable to the company for any sum of indebtedness, either as principal or otherwise, and certificates of stock shall contain upon them notice of this provision." This provision in the by-law must be regarded as meaning that the lien provided for should not be asserted against one not having notice of lien by the certificate and the issuance of a certificate not containing the notice was a waiver of the lien contemplated by the by-law; *Bank of Holly Springs v. Pierson*, 8-69.

93. —. The *Augusta Insurance and Banking Company* made an assignment of its assets for the benefit of all its creditors. Among these assets were forty-four shares of the capital stock of

the Georgia Railroad and Banking Company, which, by the assent of the last named corporation, were transferred on the transfer books to the names of the assignees, to whom a certificate of stock was also issued. At the time of the assignment and transfer, the Augusta Insurance and Banking Company was indebted to the Georgia Railroad and Banking Company in the sum of \$38,284, for which amount the Georgia Railroad and Banking Company had a lien by law upon the stock. It was held that the transfer of the stock to the assignees did not defeat this lien; *Dobbins v. Waltons, assignees*, 1-317.

94. CHARGES UPON STOCK FOLLOWING SALE. A collision occurred between a steamer of the New Jersey Steam Navigation Company and another vessel. After the accident and before actual sale of the steamboat, defendant V. sold his stock, subject to all claims against it, to defendant E. E. took the stock so purchased subject to its proportionate share of plaintiff's claim and was properly charged therewith; *Hastings, receiver etc., v. Drew et al.*, 8-560.

95. LIABILITY OF ASSIGNEE. An assignee of corporate stock, who has caused it to be transferred to himself on the books of the company and holds it as collateral security for a debt due from his assignee, is liable for the unpaid balances thereon to the company, after the company has become bankrupt; *Pullman v. Upton*, 6-34.

96. —. Where stock in a corporation is transferred by one acting as agent for the owner and the assignee receives a certificate and appears as a stockholder on the books of the corporation, he is, as between himself and creditors of the corporation, a stockholder; *Wakefield v. Fargo et al.*, 9-643.

97. —. The transferee of stock is liable for calls made after he has been received, by the company, as a stockholder, and his name registered on the stock book as a corporator and, being thus liable, there is an implied promise that he will pay calls made upon such stock, while he continues to be its owner; *Webster v. Upton, assignee*, 5-120.

98. ENFORCEMENT OF LIABILITY. Where by the charter of a corporation—in this case a bank—the stockholders are “bound respectively for all the debts . . . in proportion to their stock holden therein,” one of many creditors can not sue an individual shareholder, at law, to recover the full amount of his debt, without regard to the rights of the other creditors or the ability of other stockholders to respond to their obligations under the charter, so as to appropriate to himself the entire benefit of that stockholder's security and to exclude other creditors. The remedy is in equity where the proportion or extent of the liability can be ascertained upon an account taken of liabilities, assets and stock, a pro rata distribution of the indebtedness and the fund can properly be made and each stockholder has the right to require

that the liability of the whole body of shareholders shall be thus determined once for all; *Pollard v. Bailey*, 5-68.

99. UNPAID BALANCE ON SUBSCRIPTION FOR STOCK. It is the general rule that the stockholder, whose name is registered upon the corporate books, is liable for the amount unpaid on the shares standing to his credit on such books; ordinarily he can not dispute his ownership, but this rule is not without exception. Thus, where the owner of stock has transferred his shares, by delivering the certificate thereof properly indorsed with power to make transfer, or to cause transfer lawfully to be made, for value, the purchasers being officers of the corporation—in this case the president and a trustee—and the company has paid the dividends on the stock to such purchasers, such payments being entered upon the corporate books and the transfer to the real owners having been forbidden by the president, one of such owners himself, there is an admission, a consent and agreement on the part of the corporation that the stock belonged to the purchasers and not to the original stockholder, and the books establish that fact. In such case the receiver of the corporation, it having become insolvent, has no right of action against such original subscriber for stock for an unpaid balance of the subscription; *Cutting, jr., receiver etc., v. Damerel*, 9-618.

100. SPECIFIC PERFORMANCE. A court of equity will not decree a specific performance unless, upon all the facts disclosed, it is manifestly just and equitable to do so, as between the parties in court. So where there was a sale of shares of stock, a power to transfer attached to the certificate and a want of due diligence on the part of the purchaser to obtain evidence of the ownership of the stock and thereafter, without fraud found in the transaction, the shares of stock standing in vendor's name were sold and the first vendee could not receive the stock, the court would only decree a return of the purchase money with interest; *Wonson v. Fenno et al.*, 7-518.

101. INSTANCE. W. bought of a member of a firm shares of stock in a corporation, receiving a power to transfer the stock on the books of the company. The firm, at the time, had a large number of shares standing to its credit on the books of the corporation. W. delayed some six months to present his power of attorney to the corporation and, in the mean time, the firm sold all the shares standing in its name to others, who obtained certificates therefor. Held, that W. was not entitled, in equity, as against a member of the vendor firm who had no knowledge of the transactions, to a decree for the delivery to him of a certificate of the shares, but, only, to re-imbursement. *Id.*

102. INSPECTION OF BOOKS. A domestic corporation (of the state of New York) is within and controlled by the provision of the revised statutes of the state (1 Rev. Stat. 601, § 1), requiring the transfer book and books containing the names of stockholders

of any incorporated company to be open for inspection for thirty days previous to the election of directors; *Sage et al. v. Lake Shore & Mich. Southern Ry. Co.*, 8-500.

103. INSPECTION OF BOOKS. The revised statutes of New York, requiring the transfer book and books containing the names of stockholders of incorporated companies to be open for inspection for thirty days previous to the election of directors does not deprive the stockholders of the right to examine the transfer books of a corporation, for proper purposes and on proper occasions, at other times; and, a proceeding by mandamus may be invoked for the purpose of enforcing such right. *Id.*

104. EVIDENCE OF TRANSFER. Under the act of 1833 (L. 1833, ch. 271, § 9), in relation to proceedings, in suits, authorizing the acknowledgment of written instruments, except bills, notes and wills, as in the case of the conveyance of real estate, an assignment of and power of attorney to transfer stock, attested by a subscribing witness, is competent evidence of the transfer, and the acknowledgment may be made at any time before the paper is offered in evidence; *Holbrook v. New Jersey Zinc Co.*, 4-637.

105. COMPULSORY; LIABILITY OF COMPANY FOR. Where certain stock of a corporation, standing on its books in the name of a judgment debtor, is attached and sold by the sheriff as such debtor's property, and a judicial tribunal, of competent jurisdiction and of last resort, after a fair contest conducted in good faith by the corporation opposing it, orders the stock to be transferred to the purchaser at such judicial sale, the corporation will not be liable to the holder of the certificate, which he had not caused to be transferred to himself and who had taken no steps to protect himself, although advised of the proceeding; *Friedlander v. Slaughter House Co.*, 7-243.

106. SUBSEQUENT ATTACHING CREDITOR. By the rule of the common law the delivery of a stock certificate, with a written transfer of the same, to a bona fide purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. It requires a clear provision of the company's charter or of some statute, to take from the owner of stock, in a corporation, the right so to transfer his property; *Boston Music Hall Ass'n v. Cory et al.*, 7-520.

107. —. A sale of stock in a corporation is valid against a subsequent attaching creditor of the seller, although no transfer of the stock is made on the books of the corporation, in the absence of an express provision in the company's charter, or of some statute, requiring such mode of transfer to be pursued. *Id.*

108. JUDICIAL SALE. Under the statutes of Georgia, upon a judicial sale of shares of capital stock in a corporation, it is the duty of the officer conducting the sale to issue to the purchaser a certificate showing the purchase, and upon the presentation of this to the proper officer of the corporation, it is his duty to make

the necessary transfers upon the books of the company; *Bailey v. Strohecker*, 1-346.

See, also, **ELECTION**; **MANDAMUS**; **PERSONAL LIABILITY**; **STOCK AND STOCKHOLDER**.

TREASURER.

1. **THE OFFICE.** The treasurer of a corporation is the officer charged by law with the custody of its funds and responsible for their safe keeping. The directors can not, lawfully, deprive the corporation of this responsibility by depositing the funds with others for safe keeping or causing such disposition of the funds to be made; and may be restrained, by injunction, from so doing, at the suit of any stockholder, on a proper case being made; *Pearson v. Tower*, 5-540.

2. —. Possession of money by one as treasurer does not render him a trustee for his corporation. As treasurer he is a mere depositary of the money, having no title to it, no control over or duty in relation to it, except that of safe keeping. He has no discretion to pay it away or otherwise dispose of it, but, in these respects, is controlled by the corporation, which is the real owner. He is an agent and his possession is that of his principal; *Taylor et al. v. Taylor*, 9-382.

3. **GENERAL AUTHORITY.** The general duty of a treasurer of a private corporation is to collect, receive, hold and disburse its funds; *Kalamazoo Novelty Manuf. Co. v. M'Alister*, 6-603.

4. **IMPLIED AUTHORITY.** The station of treasurer implies that the act of indorsing certificates of stock, which stand in the name of the company of which he is treasurer, pertains to his functions, in the absence of any showing that some other position exists the duties of which would cover the act; *Walker v. Detroit Transit Ry. Co. et al.*, 7-582.

5. —. Third persons are authorized to act upon the indorsement of the treasurer for the assignment of paper assets, as an authentic proceeding of the corporation he represents. *Id.*

6. **EXCESS OF AUTHORITY.** It is not within the general power and province of the treasurer of a private corporation, without special authority, to settle and audit disputed claims, for salaries, brought by other agents of similar grade, and to issue written admissions of his determination, binding on the company; *Kalamazoo Novelty Manuf. Co. v. M'Alister*, 6-603.

7. **ASSENT OF DIRECTORS TO EXPENDITURE.** If a corporation binds itself to the payment of money upon condition subsequent, and places the sum thereof into the hands of its treasurer, in readiness to meet the obligation, and such treasurer expends the same for the benefit of the obligee in the bond, with the assent of the president and directors of the corporation, entered of record, this will bar recovery, by the corporation, of the sum so delivered to the treasurer; *Bay View Homestead Ass'n v. Williams et al.*, 6-224.

8. **ACCEPTANCE OF OFFICE.** The acceptance of the office of treasurer of a church organization does not estop the incumbent from denying its corporate existence, in the absence of proof of corporate acts; *Fredenburg v. Lyon Lake Meth. Epis. Ch.*, 6-605.

9. **BARRED DEFENSE.** The treasurer of an association can not set up, as a defense to the action of the members to recover the society's funds, that the purpose and object of the society are unlawful; *Wilson v. Owens et al.*, 5-469.

10. **ANSWER TO INTERROGATORIES.** The treasurer of a foreign savings bank having answered to an interrogatory, in a deposition, that the books of the bank, which were in his custody, showed that the bank had had business with a certain person, was asked to give an exact transcript of the entries in the books relating to the business. His answer was "see statement annexed." What purported to be a transcript of the books relating to the business was annexed to the deposition. It was held that it sufficiently appeared that the transcript had been compared with the originals and was a true copy; *Ide v. Pierce, exec'r etc.*, 9-458.

See OFFICES AND OFFICERS.

TRUST AND TRUSTEE.

1. **DEFINITION.** A trustee is one in whom property is vested in trust for others. Every person is to be deemed a trustee to whom the business and interests of others are confided and to whom the management of their affairs is intrusted; *European & North American Ry. Co. v. Poor*, 4-421.

2. **GENERAL RULE AS TO.** There is no doctrine better settled or more universally recognized than that an agent or trustee can not rightfully place himself in a position exciting in his own bosom a conflict between self interest and the duty he owes to those for whom he acts. Generally such persons will not be allowed to purchase and make profit out of the estate of those toward whom they occupy a confidential relation; *Covington & Lexington R.R. Co. v. Bowler's heirs et al.*, 4-404.

3. —. The general rule is that a trustee, so far as the trust extends, can never become a purchaser of the property embraced within the trust, save with the consent of all parties interested; *European & North American Ry. Co. v. Poor*, 4-421.

4. **THE OFFICE; DUTY.** A trustee of a corporation may resign at will, but he must not make profit, or benefit, to himself in the matter of such resignation; *Forbes et al. v. M'Donald et al.*, 6-254.

5. **DISQUALIFICATION.** A trustee, save as a statute may otherwise expressly permit, may take no part in any transaction, in which he has a present or contingent interest, adverse to the interest of his beneficiary; *Chamberlain v. Pacific Wool Growing Co.*, 6-255.

5½. **ACKNOWLEDGMENT OF DEED.** An acknowledgment of a

deed, by a trustee, who is empowered by his corporation to act with others, before himself, renders the deed void as to him; but, such acknowledgment will not adversely affect the instrument as to the other trustees who act; *Darst v. Gale et al.*, **6-380**.

6. RATIFICATION BY. The president of a board of trustees having performed an act unauthorized by his corporation, a resolution of the board of trustees, carried by the casting vote of such president, will not be effectual to ratify and adopt the unauthorized act, so as to create a liability on the part of the company; *Chamberlain v. Pac. Wool Growing Co.*, **6-255**.

7. ILLEGAL CONTRACT OF. A contract, as a note promising to pay money, a part of the consideration of which is that a trustee of a corporation shall resign his office is contra bonos mores, and void; *Forbes et al. v. M'Donald et al.*, **6-254**.

7½. REALTY IN TRUST. A corporation created, by the laws of New York, with power to act as trustee in carrying out the provisions of a will devising real estate, being, by the courts of that state, appointed trustee to hold, have charge of and manage real estate in Illinois, on a bill filed in Illinois by such corporation for a like appointment there, held, it could not hold real estate in trust in the state and that the bill was properly dismissed; *U. S. Trust Co. v. Lee*, **5-300**.

8. FRAUDULENT PAYMENTS. In an action to recover against a corporation certain amounts alleged to be due, as upon account stated, a record was admitted of resolutions passed, by which the assignors of the demand in suit, S. W. and S., who in conjunction with one other constituted the board of trustees, after reciting the donation of sundry shares to individuals "for the purpose of securing their services and influence, in carrying forward the business of said corporation," resolved that the construction account of said works should be charged with said stock, at \$25 per share and that the several parties, who had furnished the same, should be credited therewith at that price, they being the same trustees and, also, that there should be allowed to each of the trustees respectively certain sums for services rendered in the past. These resolutions were the basis of the action, recovery being sought as to the amounts voted to S. W. and S. The court held the resolution was inadmissible against objection as having none of the elements of an account stated and, further, that the resolution was against public policy and void; *Shattuck v. Oakland Smelting & Refining Co.*, **6-280**.

9. PURCHASE BY. A purchase made by the trustee when the cestui que trust is sui juris and after the relation is understood to be dissolved, will not be upheld, except where there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the cestui que trust intended that the trustee should buy and there is no fraud,

no concealment and no advantage taken by him as trustee; *Covington & Lexington R.R. Co. v. Bowler's heirs et al.*, 4-404.

10. HIS TITLE WHEN CESTUI QUE TRUST IS DISABLED. At common law a municipal corporation can not take title in another's name in trust for itself, of property not required in the performance of corporate functions. Property thus conveyed by a deed absolute on its face, for a consideration paid by the trustee, in the absence of any evidence of the trust, except between him and the corporation, would vest in the trustee, discharged of all duty to the corporation; *Root v. Shields*, 2-15.

11. POWER OVER TRUST FUNDS. Neither a guardian nor an administrator can release, without payment, any valid security belonging to the trust estate in his hands; nor can a trustee make such release on property mortgaged for the benefit of infants; *Water Valley Manuf. Co. v. Seaman*, 8-32.

12. STATUTE AS TO STOCK HELD. A statutory provision that "no person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but, the person pledging such stock shall be considered as holding the same and shall be liable, as a stockholder, accordingly" etc., does not cover or even reach the case of capital stock issued by a corporation to be held in trust for it, or in escrow, or as collateral security, to prevent the holder thereof, in whose name it stands upon the books of the company, from liability upon it, if he shall by his acts have estopped himself to deny liability as a shareholder; *Griswold v. Seligman*, 8-247.

13. CONVEYANCE BY. Where trustees of a corporation — in this case a benevolent society — had executed their personal notes for the corporate debts and made a sale in good faith of its property to a stranger in consideration of his agreement to pay such notes, such trustees might, thereafter, as individuals, re-purchase the property from such purchaser; and the agreement to pay the notes assumed by said purchaser did not render said sale fraudulent and void as to creditors of such benevolent society. In an action by a creditor, to set aside such sale, as fraudulent, the finding of the court against him can not be disturbed in the absence of proof of actual fraud; *Miller v. Lebanon Lodge, No. 48, I. O. O. F., et al.*, 9-275.

14. WASTE OF TRUST ESTATE. Where property or funds, or both, are donated by the state, to a corporation, in trust to carry out a certain object, and the fund has been put into lands and buildings it does not lose its character as a trust fund, although the property so acquired may be perverted from the use assigned; and, a court of equity will, in a proper case, i. e., a case of waste, perversion, or inability, or indisposition of the trustee to execute the trust, pursue the fund and restore it to its original purpose, into whosoever hands it may have come, unless held by inno-

cent purchasers without notice; *Att'y Gen. v. Illinois Agric. College et al.*, 6-393.

15. ACTION AGAINST — RULE AS TO. The general rule is that an action against trustees of a corporation, for a mis-appropriation of its funds, must be brought in the name of the corporation; *Cogswell v. Bull et al.*, 3-129.

16. EXCEPTION TO RULE. An exception to this rule is when a corporation, on a proper demand, from a stockholder, refuses to institute the action. In such a case the stockholders may sue in their own names. *Id.*

17. PLEADING. It is necessary, in such action by stockholders, to aver with precision a demand of and refusal by the corporation to bring suit. *Id.*

18. —. If it be conceded that demand is unnecessary because of the fact that the trustees charged with the commission of the wrong complained of constitute a majority of the board controlling the affairs of the corporation, still that fact must be explicitly and clearly stated in the pleading. *Id.*

See DIRECTORS ; OFFICES AND OFFICERS.

TRUST DEED.

1. SIMILAR TO MORTGAGE. A deed of trust, like a mortgage, is mere security for the debt. When the debt is paid the mortgage is satisfied, but so long as the debt remains the mortgage exists unless actually released; *Union Mut. Ins. Co. v. White*, 10-191.

2. IMPLIED POWER. Where, by the general law under which a corporation is organized, such corporation is authorized to contract and be contracted with, to purchase, hold, or sell property and to sue and be sued, it would seem the corporation has the power to execute a deed of trust, upon its real estate, to secure money, borrowed in furtherance of the objects of its creation, as a necessary incident to the power to acquire and hold the same; *West et al. v. Madison Co. Agric. Board*, 6-374.

3. DUPLICATE. A trust deed properly executed being lost in transitu by mail a duplicate was, afterward, executed. No ratification of this act was necessary; the original resolution authorizing the execution of the original warranted the execution of the duplicate; *Bassett v. Monte Christo Gold & Silver Mining Co.*, 8-356.

4. DIRECTOR AS TRUSTEE. The fact that a trust deed was made to one who was a director of the corporation executing it, presents no objection to the validity of the deed. *Id.*

5. ACKNOWLEDGMENT. An acknowledgment of a deed by a trustee empowered, by the act of his corporation, to act with others, before himself renders the deed void as to him. Such acknowledgment will not, however, adversely affect the instrument as to co-trustees who act; *Darst v. Gale et al.*, 6-380.

6. REFORMING DEED. Equity will reform a deed of trust to the

agreement of the parties. Ergo, when such a deed was executed by the proper officers of a corporation, but, it was made to appear (by mistake of the scrivener) that it was the deed of the officers as individuals, the court ordered it reformed; *West et al. v. Madison Co. Agric. B'd*, 6-374.

See CORPORATE DEED; MORTGAGE.

TURNPIKE COMPANY.

1. ARTICLES OF ASSOCIATION. The articles of association of a proposed gravel road company set forth no name for the corporation. The words "Fairview Turnpike" were placed at the head of the articles. Not a sufficient compliance with a statute requiring the name assumed to be set forth; *Piper et al. v. Rhodes et al.*, 1-360.

2. LENGTH OF ROAD; STATUTE CONSTRUED. A turnpike company organized under the act of the legislature of Indiana, of March 6, 1865, must make at least five miles of road, and that requirement is not fulfilled by supplying a deficiency by the acquisition, by purchase or otherwise, of a road already made; *Green, treasurer, v. Beeson et al.*, 1-362.

3. POWER OF COMMISSIONERS. The board of county commissioners can not relieve the company from this requirement, and any attempt to do so is a nullity. *Id.*

4. INJUNCTION. If a route is designated in the organization of the company which embraces less than five miles of road to be made, the company has no power under the statute, and the collection of taxes assessed for its benefit may be enjoined. *Id.*

5. CONDITION PRECEDENT TO TOLL GATHERING. Where the general legislation of the state provides that the number and location of toll gates shall be fixed by the board of supervisors, there can be no collection of tolls at gates until such supervisors have acted, to number and locate them; *Waterloo Turnpike R. Co. v. Cole*, 6-235.

6. COLLECTION OF TOLLS. Under an act, providing that the number and location of toll gates shall be fixed by the board of supervisors, an authority by the board of supervisors, to the company, to designate the location of its toll gates, is not effectual to authorize the collection of tolls at such gates. *Id.*

7. TOLLS NOT DUE. In such a case, a traveler may successfully defend against an action brought to recover from him the amount of tolls charged against him. *Id.*

8. VOID PROMISE. The promise to pay tolls, to a company not authorized to collect them, by one who has traveled upon and over the company's road, is nudum pactum. *Id.*

9. FAILURE OF ATTEMPTED CONSOLIDATION. Where two or more turnpike companies attempted a consolidation, which consolidation was afterward declared by the supreme court illegal, there is no ground for the forfeiture of the franchise of one of such companies,

by reason of a non user of its separate corporate rights during the period of such attempted consolidation; *State, ex rel. etc., v. Crawfordsville etc. Turnpike Co.*, **10-343**.

10. **FAILURE OF ATTEMPTED CONSOLIDATION.** The rights, privileges and franchises of such corporations should not be declared forfeited, and they ousted and excluded therefrom except for solid, weighty and cogent reasons, for the violation of a positive and prohibitory statute, and not of a statute whose provisions are permissive and apparently directory, and never upon merely technical grounds. *Id.*

11. **ABANDONMENT; FORFEITURE.** A road company, invested, by its charter, with the power to take private property for its use and charge tolls, impliedly undertakes to provide the road and keep it open for public travel. Where it abandons a material part of its road, its charter may be declared forfeited without the aid of a statute; *Kenton County Court v. Bank Lick Turnpike Co.*, **5-395**.

12. **EXHAUSTION OF POWER.** A road company, having once located its road, can not change the location at will, but must keep it in repair unless prevented by some vis major, or the lawful appropriation of it to the public. *Id.*

U.

ULTRA VIRES.

1. **ACTS ULTRA VIRES NOT BINDING ON STOCKHOLDERS.** Where the acts of directors are outside and beyond the scope of their authority, stockholders are not bound by such acts and may, without doubt, within a reasonable time proceed, in equity, to have such acts cancelled and their rights protected from injury and loss growing out of the unauthorized acts; *Chetlain, adm'r, v. Repub. L. I. Co.*, **6-397**.

2. **LIMITATION OF THE RULE.** Even when it is conceded that some transaction is ultra vires the corporation, a court of equity will, in many instances, refuse to interfere with the corporation, at the suit of a stockholder, as to the unauthorized contract; as where the contract is executed and, more especially, if the party complaining has stood by, allowing the transaction to be consummated and others to become interested under the contract; *Terry v. Eagle Lock Co. et al.*, **6-319**.

3. **JURISDICTION OF EQUITY.** Where want of power is pleaded in favor of a corporation, to defeat the payment of the consideration for benefits which it has received and enjoined, courts will go so far as is consistent with rules of law to reach justice, equity and good conscience. On the other hand, where such want of power is pleaded against the corporation to prevent the perpetra-

tion of a wrong, courts will hold the corporation to the strictest rules of law; *Board etc. v. Lafayette etc. R.R. Co.*, 7-26.

4. JURISDICTION OF EQUITY. Information in equity, in the name of the attorney general, will lie against a quasi public corporation doing and contemplating acts which are ultra vires and illegal, the necessary effects of which are not only to impair the rights of the public but to create a nuisance; *Att'y Gen. v. Jamaica Pond Aqueduct Co.*, 9-437.

5. ACTS WHICH ARE. Acts ultra vires a corporation are such acts as are not within the powers conferred on the corporation by the act of its creation and are in violation of the trust reposed in the managers, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created; *Whitney Arms Co. v. Barlow et al.*, 8-425.

6. RULE AS TO. A corporation can not avail itself of the defense of ultra vires when the contract has been, in good faith, fully performed by the other party and the corporation has had the full benefit of the performance and of the contract. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. The only justification for such a plea by an individual, sued upon a contract, with a corporation, is that the obligation is not mutual, as the other party, the corporation, would not be bound by its statements, to the extent of the debts incurred by the corporation, to recover the contract price for. *Id.*

7. INSTANCE. In an action brought by a corporation against the trustees of another corporation under a statute creating a liability of trustees for the debts of a corporation incurred during and upon default of the corporation to publish periodical financial statements, to recover the contract price for goods sold and delivered to defendants' corporation, it was held that the objection that plaintiff was not authorized by its charter to manufacture and sell the goods, or enter into the contract, was not available as a defense. *Id.*

8. GENERAL RULE. It is the general doctrine that corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and none others. But, although there may be a defect of power in a corporation, to make a contract, if the contract made be not in violation of the charter of the corporation, or of any statute prohibiting it and the corporation has, by its promise, induced a party relying upon such promise and in the execution of the contract, to expend money and perform its part of the contract, the corporation will be held liable on such contract; *State Board of Agriculture v. Citizens Street Ry. Co.*, 5-358.

9. —. Although a corporation can make only such contracts

as its charter authorizes, it may be held liable for acts and contracts not permitted by such charter. The general rule is, that if a corporation, in the exercise of a franchise not granted to it by the legislature, makes a contract or performs an act, the want of authority may be pleaded and the courts will not interfere to grant redress between two parties engaged in an illegal enterprise. If the contract be within the scope of the franchise and merely fails to conform to the regulations prescribed by the charter for the guidance of the corporate officers and the protection of the rights of the members as to each other, the corporation may be held liable, under the general rules of law as to agents, estoppel, waiver, etc.; *City Fire Ins. Co. of Hartford v. Carrugi*, 4-333.

9½. GENERAL RULE. When powers are conferred and defined every one dealing with the corporation is presumed to know the extent of such powers, and when a want of power is apparent upon comparing the act done with the terms of the charter, the defense of *ultra vires* is available against the party dealing with the corporation. When the existence of the power depends not merely upon the law upon which the corporation acts, but upon the existence of extrinsic facts, resting peculiarly within the knowledge of the corporate officers, the defense is not available; *National Bank v. Globe Works*, 3-394.

10. APPLICATION OF DOCTRINE. While the contract of a private corporation remains unexecuted on both sides, a corporation is not estopped to say, in its defense, that it had not the power to make the contract sought to be enforced against it. It is otherwise when such a corporation seeks to evade the payment of borrowed money, on the ground that, although it had the power to borrow money, it expended it, as borrowed, in prosecuting a business which it was not authorized to prosecute, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers and that his money would be used in such business, provided the business itself be free from any intrinsic immorality or illegality; *Bradley v. Ballard*, 3-275.

10½. —. The doctrine of estoppel as to an act *ultra vires*, is applied only for the purpose of compelling corporations to be honest. While a contract remains executory, the powers of private corporations can not be extended, beyond their proper limits, for the purpose of enforcing a contract, and on application of a stockholder, or of any other person authorized to make the application, a court of chancery will interfere and forbid the execution of a contract *ultra vires*. If a contract, *ultra vires*, is made, between such a corporation and another person, and while it is wholly unexecuted, the corporation recedes, the other contracting party would, probably, have no claim for damages. If, however, such party proceeds in the performance of the contract, expending money and labor in the production of values which the corporation

appropriates, the corporation can not be excused from payment on the plea that the contract was beyond its power. *Id.*

11. **INSTANCE.** A mining corporation was organized under a general statute of Illinois for the incorporation of companies for the purposes of gain, which required, among other things, the certificate to state the town and county in which the operations of a company incorporated under the act are to be carried on. The company stated its operations were to be carried on in the city of Chicago. The company engaged in mining in the territory of Colorado and in the prosecution of that work borrowed money. A stockholder sought to enjoin the collection of the notes given to evidence the indebtedness, on the ground that they were given for money borrowed to prosecute a business the company had no power to prosecute, and that the lenders had knowledge of this purpose. Held, the bill can not be maintained, the doctrine of *ultra vires* not applying. *Id.*

12. —. The authorities of a hospital for the insane, entered in to a contract by which they commuted the weekly cost of the care and maintenance of a patient, at a certain sum for her support during life. That sum was paid and shortly thereafter the patient died. An equitable action was brought to recover the sum unearned, by the brother of the deceased, who had entered in to the contract and paid the money. Upon a second argument before the full bench, it was held, the power to make and alter rules and regulations for the administration and government of the hospital and the admission and discharge of persons, did not include the power to make such contract; which was in the nature of a life insurance or wager contract depending upon the duration of the life of the patient, and not in the course of the business of the corporation, to enable it to attain the purposes of its creation, wherefore it was made *ultra vires* and was void; *President and Visitors of the Md. Hospital v. Foreman*, **3**-356.

13. **CONTRACTS.** A corporation has no existence apart from its officers conducting its affairs and who represent the shareholders. As between themselves, any contract fairly entered in to would seem to be valid. At all events, a corporation will be estopped to say its contract is *ultra vires* and sue its stockholders upon obligations, arising by implication of law, that it has once solemnly waived. But, no such doctrine can be applied to creditors of a corporation; *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co. et al.*, **6**-48.

14. **IN EXCESS OF AGENT'S AUTHORITY.** Where the officers or agents of a corporation have exceeded, not the powers of the corporation, but their own power as agents, the corporation stands like other principals employing agents. If it, knowingly, receives the fruits of the excessive exercise of authority by its agent, it is held to have ratified the act; *Wood Hydraulic Hose Mining Co. v. King*, **4**-344.

15. **TO DENY CONTRACT.** While corporations will not be permitted to exercise powers, which might be hurtful to the public interests, beyond those expressly conferred by their charters, such corporations will be estopped from denying their authority to contract after having exercised powers germane and incidental to those conferred and in furtherance of the general objects of their incorporation; nevertheless, the subject of the contract may not be within any definite power expressly granted; *West et al. v. Madison Co. Agric. Board*, 6-394.

16. —. It is too late after a corporation has received the full benefit of a contract entered in to, and when it is called on to perform its part, to set up that such contract, on the part of the demandant, was an abdication of a specific corporate function; *Hall Manuf. Co. v. Amer. Ry. Supply Co.*, 7-597.

17. —. If a contract with a national bank can be valid under any circumstances, an innocent party has a right to presume the existence of such circumstances, and the corporation is estopped to deny them; *Merch's Nat. Bank v. State Nat. Bank*, 3-25.

18. —. The maker of a promissory note, not negotiable, discounted by a national bank, can not question the right of the bank to recover on it, on the ground that such bank has no right to deal in such paper; *Nat. Bk. v. Gillilan*, 8-243.

19. —. A party dealing with a corporation, in a matter not within the purview of its delegated power, does not estop himself from setting up in defense the want of authority in the corporation to make the contract; *Chambers v. Falkner*, 6-182.

20. **DOCTRINE, WHEN APPLICABLE.** In some cases an obligation made by a corporation is validated by the fact that the corporation has had a benefit, under the contract, from which arises an obligation to pay the debt in common with other debts; but, where a creditor claims a mortgage security which gives him a lien on the property of the corporation in priority over other creditors, he can not maintain his security unless he establishes the validity of his mortgage, as an incumbrance, which the corporation had power to make; *Hackensack Water Co. etc. v. De-Kay et al.*, 9-558.

21. **VOIDANCE OF ACTS.** A corporation has power to do such business only as it is authorized, by its act of incorporation, to do, and no other. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter and, therefore, unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and, a

court of common law will sustain no action, on the contract, against the corporation. *Davis et al. v. Old Colony R.R. Co.*, 7-549; *Same v. Smith Amer. Organ Co.*, 7-549.

22. DOCTRINE APPLIED TO CONTRACTS. If a corporation make a contract altogether outside of the purposes of its creation, it is void, because it has no power over the subject in reference to which it acted. If it contracts with reference to a subject within its powers, but in so doing exceeds them, the person with whom it deals can not set up such violation of its franchise to avoid the contract. It might be ground for the resumption of its franchise by the state; Littlewort, superintendent etc., *v. Davis et al.*, 8-17.

23. CONTRACT ULTRA VIRES THE CORPORATION; NO RECOVERY. An agreement, or contract, which is ultra vires the corporation executing it, will not support an action against the corporation sued to enforce it; *Davis et al. v. Old Colony R.R. Co.*, 7-549.

24. —. To such a contract the principle in *pari delicto* does not apply. The contract will be regarded as void, and the party who advances the money to such corporation will be entitled to his legal remedy, in repudiation of the contract, to recover the money from the corporation, upon the principle that it had acquired no right or title to it under the contract; *President and Visitors of the Md. Hospital v. Foreman*, 3-356.

25. NOTICE TO DEALER. Corporations possess such powers, and such only, as the law of their creation confers upon them; and, when created by public acts of the legislature, parties dealing with them are chargeable with notice of their powers, and the limitations thereof, and can not plead ignorance in avoidance of the defense of ultra vires; *Franklin Co. v. Lewiston Institution*, 7-307.

26. —. Corporations may not enter into a business other than that which they are authorized by law to transact. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by charter; *N. Orl. etc. Steamship Co. v. Ocean Dry Dock Co.*, 7-195.

27. INSTANCE. Plaintiff sued defendant for the amount of a subscription by the latter, to the stock of the former. The subscribing to the stock of the plaintiffs is neither incidental to, nor necessarily connected with, the purpose and business for which defendant was organized as a corporation and is beyond the power and authority conferred by the charter. The owning of steamships is a distinct business, and the docking and repairing of such vessels would be a subordinate—secondary—consideration and not that the owning of stock in a steamship company would be an incident to the business of docking and repairing vessels. It follows that a subscription by a dry dock company, organized for the purpose of owning a dock, and docking, repairing, and building vessels, and for such other business as belongs, or is in-

cidental to that purpose and business, to the stock of a steamship company can not be enforced. *Id.*

28. NOTICE OF POWERS. Persons dealing in the negotiable securities of a corporation are chargeable with notice of the powers of the corporation to make such securities as conferred by its charter. If the power granted, by the charter, is subject to a condition relating either to the form in which such securities shall be made, in order to be valid, or relating to some preliminary proceeding extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of bona fide holders; *Hackensack Wa. Co., etc., v. De Kay et al.*, 9-558.

29. —. This doctrine does not prevail in those instances in which the right to issue such securities is, by charter, conditioned upon the performance of acts by the corporation or its officers, relating to the management of the affairs of the corporation. In such cases if a person dealing with the corporation finds the acts to be within the scope of its powers, under its charter, he has a right to assume that all such conditions have been complied with. *Id.*

30. —. The doctrine which validates securities of a corporation within its apparent powers, but improperly and, therefore, illegally issued for the want of acts to be done by the corporation or its officers in the management of its internal affairs, applies only in favor of bona fide holders for value. One who takes such a security with knowledge that the conditions, on which alone the security was authorized, were not fulfilled is not protected and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation which would not be available against a bona fide holder of the same security. *Id.*

31. INSTANCE. The Hackensack Water Company was incorporated in 1869, with a capital of \$50,000; but with authority to organize as soon as \$20,000 of the capital stock should be subscribed and paid in. The corporation was organized and directors elected in 1873. Very little of the stock had then been subscribed; less of it had been paid in. The directors were not qualified to hold their offices and were irregularly chosen. Under this organization the company bought and took title for lands in its own name, constructed its works, acquired property to a considerable amount and contracted debts to a larger amount. On a bill to foreclose a mortgage made by the corporation it was held that the corporation was a corporation de facto, its directors officers de facto, and that the acts of the latter were binding on the company. *Id.*

32. —. The charter of the Hackensack Water Company authorized the company to increase its capital from \$50,000 to \$100,000, and empowered it to borrow money not exceeding two-

thirds of the capital paid in, and to secure the same by bonds and a mortgage upon its property and franchises. In August, 1873, a resolution was passed to increase the capital to \$100,000. In September, 1873, the directors adopted a resolution that 133 bonds, of \$500 each, be issued, payable to a trustee or bearer, with coupons for the semi-annual interest. The bonds, authorized by this resolution, and, in fact, issued, amounted to \$66,500, nearly two-thirds of the capital authorized when increased. At that time not over \$2,000 of capital had been paid in. In a suit to foreclose the mortgage made in pursuance of this resolution, duly executed under the corporate seal, it was held that the mortgage, being within the powers granted by the charter, and, on its face having the appearance of being within the company's power to mortgage, was a valid security in favor of bona fide holders of the bonds, notwithstanding the directors acted illegally in making the mortgage and the bonds and putting the bonds in circulation without first obtaining subscriptions to the capital to be made and paid in, sufficient in amount to justify them in making a mortgage. *Id.*

33. **ACTS WHICH ARE.** Any action, on the part of a corporation, outside the limits marked out in the legislative grant, is *ultra vires*; *Black et al. v. Delaware & Raritan Canal Co. et al.*, 5-547.

34. **CONTRACT IN EXCESS OF POWER.** A contract, by a corporation, outside the purposes of its creation is void; but, where a corporation contracts with reference to a subject within its powers, although, in so doing, it exceeds them, the person with whom it deals can not set up such violation of its franchise to avoid the contract; *Littlewort, superintendent etc., v. Davis et al.*, 5-493.

35. **PURCHASE OF LANDS IN EXCESS OF AUTHORITY.** The grantor in a deed to a corporation having power to purchase real estate, but whose power is limited in such acquisitions to purposes stated, can not have the conveyance set aside and his contract rescinded, on the ground that the corporation, in taking the conveyance, did so for a purpose other than that prescribed, and thus exceeded its power; *Hough v. Cook County Land Co.*, 5-295.

36. **VALIDITY OF TITLE.** In such case, the question of the validity of title to real estate so conveyed to it, can not be made to depend upon proof as to whether or not the land is held for the specific purpose for which the corporation is entitled to acquire and hold. The title will vest in the corporation, and the question as to whether the corporation has exceeded its power, may be raised only by the state or by a stockholder, as a citizen of the state, causing steps to be taken in the name of the state. *Id.*

37. **RIGHT OF CREDITOR.** Where a creditor of a corporation had no knowledge that the corporation had exceeded the limit beyond which it was forbidden to contract debts, and could not, by inquiry, have ascertained that fact, the doctrine of *ultra vires* does not apply; *Ossipee Hosiery & Woolen Manuf. Co. v. Canney*, 5-532.

38. **ACT IN EXCESS.** A contract to purchase for sale to another a quantity of excelsior, by a corporation organized for the manufacture and sale of carriages, is ultra vires and void; *Day v. Spiral Spring Co.*, 10-647.

39. **REPUDIATION.** Being void, such contract is open to repudiation by either party. *Id.*

40. —. Plaintiff contracted to manufacture for defendant corporation a certain quantity of excelsior which defendant had contracted to sell to other parties, and having delivered a portion under the contract, refused to go on with the contract, and brought suit for the value of what had been delivered. Held, plaintiff was entitled to recover for as much as had been delivered and not paid for. Held, further, that plaintiff was not estopped to allege the illegality of the contract as ultra vires. Held, further, that defendant could not recoup against plaintiff's claim, damages for a failure to go on with the contract, because to allow recoupment would be indirectly to enforce the contract. *Id.*

41. **AS TO STOCK.** Any attempt to increase the capital stock beyond the limit named in the charter, without legislative sanction, is ultra vires, the stock itself is void, and confers on its holder no rights, and subjects him to no liabilities; *Grangers Life & Health Ins. Co. v. Kamper*, 10-21.

42. —; **INSOLVENCY OF CORPORATION.** The rule is not changed if the corporation is insolvent, and its stock of doubtful value, and the stock is issued to a creditor in settlement of a demand which it had no other means of paying; *Jackson v. Trauer*, 10-393.

43. **CANCELLATION OF STOCK.** Plaintiff is a stockholder in the defendant association. Defendant's eighth article of incorporation provides that "upon the termination of the corporation, the funds and assets of the same, after paying all debts and expenses, shall be divided among the stockholders in such proportion as each may be justly entitled to, in accordance with the number of shares held by each, after deducting all assessments, fines, dues and other charges, then due by such stockholders. Under this article plaintiff, so long as he performs his duty as a stockholder, is entitled to retain his stock and his place as a stockholder until the termination of the corporation, and to a right to share of net funds and assets, as in such article provided. So long as he performs his duty as a stockholder, he can not, save by his own consent, be forced out of the association — in this case a building association — as respects the whole or any part of his stock, by any action of the association, through its board of directors or by the combined action of the other stockholders. Hence, the association has no authority to retire or cancel any part of his stock against his will and without any default on his part, any such retiring or cancelling being ultra vires; *Bergman v. St. Paul Mnt. Building Ass'n*, 9-492.

44. NOTICE TO CONTRACTORS; CAVEAT EMPTOR. Every person who enters into a contract with a corporation is bound, at his peril, to take notice of the lawful limits of its capacity; especially where all acts of incorporation are, or are deemed to be public acts, and every corporation organized under general law is required to file in the office of the secretary of state a certificate showing the purpose for which the corporation is constituted; *Davis et al. v. Old Colony R.R. Co.*, 7-549; *Same v. Smith Amer. Organ Co.*, 7-549.

45. CONTRACT NOT TO BE RATIFIED. A contract ultra vires the charter of a corporation is void. It can not be made valid by any subsequent act of the corporation; because, there is no residuary power to confirm it. That which it could not make or do, it can not ratify. A void act can never become valid because it remains unquestioned; *Board of Comm'rs of Tippecanoe Co. v. Lafayette etc. R.R. Co. et al.*, 7-26.

46. ACTS MAY BE MADE GOOD. Acts of a corporation which are not illegal in themselves or by prohibition, but which are ultra vires the corporation, may be made good by the assent of the stockholders; so far, at least, that strangers to them, dealing in good faith with the corporation, will be protected in a reliance on those acts; *Kent v. Quicksilver Mining Co. et al.*, 8-613.

47. DOCTRINE OF; WHEN TO PREVAIL. The rule, ultra vires, prevails in full force only where the contracts of corporations remain wholly executory; *Thompson et al. v. Lambert et al.*, 6-523.

48. APPLICATION OF THE DOCTRINE. The general rule is that the plea of ultra vires shall not prevail when, instead of advancing justice, it would accomplish a wrong. Where a corporation has received money on the faith of its act, which has been appropriated to enlarge its capital and, thereby, the amount with which its debts were to be paid, and, if it should prove solvent, the amount of the distributive shares of its stockholders, it will not be permitted to claim irresponsibility on the ground of lack of authority to do the act by which it procured the money; *Darst v. Gale et al.*, 6-380.

49. —. A private corporation can not avail of the defense of ultra vires where the contract has been, in good faith, fully performed by the other party, and the company has had the benefit of the contract and the performance. *Id.*

50. DEFENSE TO PREMIUM NOTE. It is a good defense to an action on a promissory note, that it was executed and delivered for the consideration of a policy of insurance, which policy was ultra vires and void; *Rochester Ins. Co. v. Martin*, 3-486.

51. WHEN NOT PREVAIL AS A PLEA. The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong; *Whitney Arms Co. v. Barlow et al.*, 8-425.

52. **INSTANCE.** A loan of the school fund upon mortgage or other security than that named in the statute, by the corporate trustees having charge thereof, is a mis-application of the funds, for which the trustees would have been personally liable; but, the mortgage or other security given for such loan, is not void, in the absence of express words of the statute; *Littlewort, superintendent etc., v. Davis et al.*, 8-17.

53. **INVESTIGATING ILLEGAL ACT.** The only exception to the rule which prohibits collateral inquiry, by a private citizen, into the supposed illegal acts of a corporation, is where such investigation is expressly authorized by legislative enactment; *Martindale v. Kansas City, St. Louis & Council Bluffs R.R. Co.*, 8-142; *Shewalter v. Pirner* (note), 8-143.

54. **ESTOPPEL TO PLEAD.** A corporation having entered into a contract which has been performed by the parties contracting with it, in good faith, and the company having had the full benefit thereof, it is not allowed to interpose the defense of ultra vires; *Ward, rec'r, v. Johnson et al.*, 6-462.

55. —. It is too late after a corporation has received the full benefit of a contract entered into, and when the contracting corporation is called upon to perform on its part, to set up that the contract on the part of demandant corporation was an abdication of a specific corporate function; *Hall Manuf. Co. v. Amer. Ry. Supply Co.*, 7-597.

56. **NOT BINDING.** A corporation may become bound by the act of its board of directors, when stockholders, as between themselves and the corporation, would not be bound by the same act, unless acquiesced in; but, if the act is ultra vires the corporation it is void, and no one is bound; *Board of Comm'rs v. Lafay. etc. R.R. Co.*, 7-26.

57. **ACT, WHEN BINDING.** An act ultra vires a corporation, when regularly done, binds both the corporation and its stockholders; *Whetstone v. Ottawa University*, 7-116.

58. **PRESUMPTION.** The contract of a corporation must be treated as valid, unless it appears affirmatively to be a contract to do some thing which is beyond the reasonable exercise of the power granted; *Morville v. American Tract Society*, 7-473.

59. **EXECUTED CONTRACT.** Conceding there may be a question of power of a corporation to make a contract — as in this case a loan — the contract having been executed, the question of power can not be raised in a proceeding against directors to hold them to a personal liability as for a breach of trust. Where the parties complaining have received the consideration of the contract, in other respects just and equitable, there is no principle upon which a court of equity could be induced to interfere upon the mere ground of the want of authority in the adverse party; *Booth et al. v. Robinson et al.*, 7-419.

60. **DISTINCTION AS TO QUALITY OF ACT.** There is a clear distinction, regarded by the doctrine of *ultra vires*, between the exercise, by a corporation, of a power not conferred upon it, varying from the objects of its creation, as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party; *Davis et al. v. Old Colony R.R. Co.*, 7-549; *Same v. Smith Amer. Organ Co.*, 7-549.

61. **INSTANCE.** It is beyond the powers of a railroad corporation chartered by the legislature or of a corporation organized under general incorporation law (Stats., Mass., 1870, ch. 224) for manufacturing purposes — as for the manufacture and sale of musical instruments, to guarantee the payment of expenses of a musical festival. No action can be maintained against either corporation upon such a guaranty, although such guaranty was made under a reasonable belief that the holding of the proposed festival would be of great pecuniary benefit to the corporation which signed the guaranty, by increasing its proper business, and the festival was held and expenses incurred in reliance upon the guaranty. *Id.*

62. **CONTRACT IN VIOLATION OF STATUTE.** The general rule is that all contracts made in violation of an express statutory provision are inoperative and void; and no recovery can be had on them, though the defendant is a party to the violation of the law, in the absence of fraud or bad faith on his part upon which to found an estoppel; *Penn v. Bornman et al.*, 9-134.

63. —. The distinction in some of the old cases between *malum prohibitum* and *malum in se* has long since been exploded, and the rule is now well established that no agreement to do an act forbidden by statute, or to omit to do an act enjoined by statute, is binding. *Id.*

64. **LOAN TO DIRECTOR IN VIOLATION OF CHARTER.** The charter of a bank provided that "no director of said corporation shall be indebted to said corporation either directly, or indirectly, or individually, at any time, to an amount greater than seventy-five per centum of the capital stock held by such director, in good faith, as his own." In such case a director can not enter into a valid contract with the bank, as guarantor or indorser, without regard to his ownership of stock and in violation of such provision, and no recovery can be had by the bank under such a contract against him or his estate. The prohibition, in such case, applies to the bank as well as to the directors. *Id.*

65. —. A provision in a bank charter prohibiting the directors from becoming indebted to the bank is not purely personal to the directors, but it is equally a mandate to the bank, which it is as much bound to observe as the directors themselves. It goes

directly to the power or capacity of both the bank and directors to enter into any engagement or agreement by which the latter may become indebted to the former. *Id.*

66. **LOANING FUNDS.** Where a corporation is formed not for pecuniary profit, and the express power to loan money is not conferred on it, no such power can be implied; *Chambers v. Falkner*, 6-182.

67. —. A corporation, not created for banking purposes, or to conduct some business usual in banking, whatever may be its character, though it may have the power of borrowing money, has not an implied power of loaning its funds. *Id.*

68. **MORTGAGE.** Promissory notes, or mortgages given as security for a loan to a corporation which has not the power to loan its funds, are wanting in validity and will not furnish a cause of action, at law or in equity. *Id.*

69. **PURCHASE OF CORPORATE STOCK.** It is not competent for the trustees of a savings bank, at a time when there are no funds in the bank for investment, to agree to take shares in a manufacturing corporation and, thereby, create a debt binding on the bank; nor to invest its funds in such stock, unless expressly authorized so to do by its charter, or the public laws of the state of its creation; *Franklin Co. v. Lewiston Institution*, 7-307.

70. **RECEIPT OF DONATION IN EXCESS OF POWER.** If a corporation, in excess of the powers conferred by its charter, receives a sum of money, on condition that it will return it if an additional sum be not raised within a stated period of time and the condition is broken, an action may be maintained against such corporation, on implied promise to return the money; and, a demand for its return may be submitted to arbitration; *Morville v. American Tract Society*, 7-473.

71. **INVALID CHARTER.** Where a corporation has sought and procured a charter, under which it has power to construct a certain structure, has made a contract for the erection thereof and received the benefit of the contract, by the erection of the building, it can not avoid liability, in an action brought to recover money due on such contract, by showing that the provision of its charter, authorizing the erection of the building, is invalid; *Trustees of Prairie Lodge v. Smith*, 8-66.

72. **IN EXCESS OF POWER.** A corporation has general authority to make contracts within the scope and objects of its incorporation. If it make a contract embracing matters both within and beyond the scope and objects of the incorporation, such contract will be held good as to the former and void as to the excess; *Farmers & Traders Bank v. Harrison et al.*, 8-129; *Rittenhour v. Same*, 8-137.

73. **INDEMNITY BOND.** If a note be executed by the agent of a corporation, principal obligor on an indemnity bond, to the obligee in the bond, without consideration and after the execution of the

bond, the sureties on the bond will not be liable in an action upon the bond as for a breach in the non payment of such note; *Cox et al. v. Weed Sewing Machine Co.*, 8-59.

74. **BANKING.** The charter of a corporation (*Laws New York*, 1870, ch. 685) granted it authority "to grant, bargain, sell, buy or receive all kinds of property, . . . or to hold the same in trust, or otherwise, . . . and to advance moneys, securities or credits upon any property." In an action brought by the corporation, on two promissory notes, executed by defendants, the answer alleged, in substance, that plaintiff carried on a regular banking business, keeping an office for discounts and deposits; that the notes in question were discounted by it, in the course of such business, and the proceeds credited, upon its books, to one of the defendants. It was held that the provision of its charter did not confer, on plaintiff, banking powers, or authorize it to discount commercial paper; and, this being prohibited to any corporation not expressly incorporated for banking purposes (1 *Rev. Stat.*, 600, § 4; see, also, 1 *Rev. Stat.*, 712, §§ 3, 5), that the notes were void and that the answer set up a good defense; *New York State Loan & Trust Co. v. Helmer*, impleaded etc., 8-594.

75. **DILIGENCE TO PREVENT, OR AVOID, USURPATIONS.** A stockholder, of a corporation, who seeks to prevent the consummation of an illegal corporate act, or to avoid it, should be swift to make known his desires and assert his rights, in the tribunals appointed for that purpose; *Thompson et al. v. Lambert et al.*, 9-5623.

76. **AS A DEFENSE.** In an action of deceit, against a national bank, to recover damages for the alleged false representations of its teller, in the sale to plaintiff of certain railroad bonds, it was adjudged that the selling of railroad bonds on commission was not within the authorized business of a national bank; and, being thus beyond the scope of its corporate powers, the defense of ultra vires was open to it, and it was not responsible for any false representations its teller might have made to plaintiff and by which she was induced to purchase the bonds; *Weckler v. First Nat. Bank of Hagerstown*, 7-354.

77. —. An abuse of the corporate powers is not a sufficient defense to a note executed by the purchaser of stock of a corporation — in this case a national bank — in consideration of stock sold to him, which had been pledged collaterally for the payment of an indebtedness. The question of mis-user will not be decided, collaterally, by setting aside a sale otherwise good; *Union Nat. Bank v. Hunt*, 9-528.

78. **JURISDICTION OF EQUITY.** Even when it is conceded that some transaction is ultra vires the corporation, a court of equity will, in many instances, refuse to interfere with the corporation, at the instance of a stockholder, in respect to the unauthorized contract; as when it has been fully executed and this, too, where

if the same shareholder had applied in apt time, for an order to restrain the execution of the contract, it might have felt bound to grant relief; *Terry v. Eagle Lock Co. et al.*, 6-319.

79. —. Especially will a court of equity decline to interfere with an executed contract of a corporation, albeit unauthorized on the part of the company, where the party complaining of the act has stood by, allowing the transaction to be consummated and has induced, or allowed, others to become interested in the corporation in the belief that the existing state of things was lawful. *Id.*

80. RULE OF EQUITY. Where want of power is pleaded in favor of a corporation, to defeat the payment of the consideration for benefits which it has received and enjoyed, courts will go as far as is consistent with fixed rules of law to reach justice, equity and good conscience, by enforcing the contract. On the other hand, where the want of power is pleaded against the corporation to prevent the perpetration of an alleged wrong, courts will hold the corporation to the strictest rules of law. In either case the action of courts is based upon the fundamental principle, that, no one shall take advantage of his own wrong; *Board of Comm'rs of Tippecanoe Co. v. Lafayette etc. R.R. Co. et al.*, 7-26.

81. INFORMATION IN EQUITY. An information in equity, in the name of the attorney general, will lie against a quasi public corporation doing and contemplating acts which are ultra vires and illegal, the necessary effects of which are not only to impair the rights of the public, but to create a nuisance — in this case by impairing the public easement of fishing and boating in one of the great ponds of the commonwealth and by creating a nuisance by lowering the pond and exposing slime, mud and offensive vegetation upon the shore, to the detriment of the public health; *Att'y Gen. v. Jamaica Pond Aqueduct Co.*, 9-437.

82. INSTANCE. Under the statute of Massachusetts, of 1868 (ch. 182), authorizing the corporation named, for the purpose of better supplying fresh water and of saving and retaining the water that percolates from a certain great pond into another great pond, named, in land owned by the corporation, to take, hold or purchase any land near or adjoining said land and to enlarge the last named pond and to raise a dam on said land, and providing that the water of said pond shall never be drawn down lower than a certain depth, except for the purpose of repairing the dam, or cleaning out the pond, the corporation has no right to sink wells, on the land so taken, for the purpose of intercepting the under ground currents as a source of water supply. Such acts are ultra vires and illegal. *Id.*

83. RIGHT OF PRIVATE ACTION. Whenever an information will lie to a question a contract, as being ultra vires a corporation,

a private remedy will lie against the contract as being void; Board of Comm'rs etc. *v.* Lafayette etc. R.R. Co. et al., 7-26.

84. CERTAINTY IN PLEA. In an action by a corporation, obligee in a bond of indemnity executed for and by an agent, to recover the principal obligor's note and his debt of one dollar, a plea by the sureties in such bond, that the plaintiff has not power to make the contract sued on — if allowable at all — must state which contract is sought to be impugned and wherein it is beyond the corporate power; Cox et al. *v.* Weed Sewing Machine Co., 8-59.

See, also, ESTOPPEL; NATIONAL BANK; POWERS.

UNINCORPORATED COMPANIES.

1. LIABILITY OF MEMBERS. An unincorporated organization can not be a party to a contract, nor to an action at law; and persons contracting in the name of such an organization are themselves personally liable, either as being in fact principals, or as holding themselves out as agents for a principal which has in law no existence; Lewis *v.* Tilton, 10-383.

2. —. Semble, that all members of such a body who assent to an undertaking whereby a debt is incurred, or who subsequently ratify it, are liable. *Id.*

UNIVERSITY.

1. SUBSCRIPTION; CONSIDERATION. Where a subscription was made to the endowment fund of the North-western Christian University, and a bond given for the unpaid portion thereof, the amount secured by the bond is regarded as a loan, and the failure of the university to pay six per cent. interest upon such subscription in tuition does not show the consideration for such bond has failed; nor does it constitute a defense to an action upon the bond; nor does the refusal of the university to issue stock, for the subscription, constitute any defense; Hazelett *v.* Butler University, 9-252.

See EDUCATIONAL INSTITUTIONS; LOTTERY.

USAGE; see CHURCH ORGANIZATION; CUSTOM; EXPRESS COMPANY; INSURANCE; RELIGIOUS SOCIETY.

USURY.

1. EXTENT OF ILLEGALITY. Usury is not, now, considered a crime, so as to render invalid every contract into which it enters. The contract is illegal only to the extent of the forbidden excess of interest; Farmers & Traders Bank *v.* Harrison et al., 8-129; Rittenhour *v.* Same, 8-137.

2. —. A statute authorized the formation of banking corporations, with power to loan money at a rate of interest not to exceed ten per centum per annum. A promissory note taken to secure a loan made at a greater rate of interest is not void. *Id.*

3. **LAW GOVERNING.** Usurious contracts made with corporations are governed by the general law relating to interest and usury. Suits upon such contracts must be disposed of in like manner as in cases of such contracts between natural persons. *Id.*

4. **RELEASE OF SURETIES.** An extension granted, on a promissory note, founded upon the payment of usurious interest in advance, by way of consideration, creates no legal obligation to refrain from suit on the note; wherefore, it does not release sureties. *Id.*

5. **MORTGAGE DEBT.** Usury in a debt secured by mortgage does not render the debt or mortgage void and in an action of ejectment by mortgagee no inquiry into the validity of the debt is admissible. The party complaining of usury must proceed, in equity, by bill to redeem; *Kelly v. Mobile B. & Loan Assoc.*, 6-160.

6. **ACCOMMODATION NOTE.** An accommodation indorser of a promissory note made by a manufacturing company, for its benefit, can not defend against the same on the ground of usury; *Stewart v. Bramhall*, 8-541.

7. **COMMISSION.** The payment of an amount to a loan broker as commission, by the borrower of money, which, added to the current interest upon the note, largely exceeds legal interest, does not show usury without proof that the broker acted as agent of the lender; *Brown v. Scottish Am. Mtg. Co.*, 10-233.

8. **INTEREST IN ADVANCE.** It is not usurious to exact interest in advance on a loan. *Id.*

9. **PENAL LAWS OF ANOTHER STATE.** The courts of Illinois will not take jurisdiction of a suit by a corporation created by and existing under the laws of and doing business in another state against a national bank organized under the laws of the United States, for the recovery of a penalty, provided for by act of congress, for receiving interest over and above the rate allowed by the laws of the state where the bank is located and transacts its business, that being also a foreign state; *Missouri River Tel. Co. v. First Nat. Bk. of Sioux City*, 5-322.

10. **STATUTE OF NEW YORK.** The statute of New York, of 1850, prohibiting a corporation from interposing the defense of usury, includes the collateral contract of individuals as sureties, guarantors or indorsers for the corporation; *Stewart v. Bramhall*, 8-541.

11. **FEDERAL LAW.** The provisions of the United States statute of 1863, chapter 106, § 30, imposing penalties upon national banks for taking usury, supersede the state laws upon that subject; *Davis, receiver, v. Randall*, 5-455.

12. —. The provision of the 30th section of the national banking act, of June 3, 1864, limiting the forfeiture, for usurious charges by national banks, to the interest carried with the evidence of debt or which was agreed to be paid thereon, applies to

banks in all the states and supersedes state laws on that subject ; *National Bank v. Garlinghouse et al.*, 4-38.

13. **FEDERAL LAW.** The laws of the states, which avoid usurious contracts, do not obstruct or impede national banks, as agents of the government, in doing any thing which the public interests require that they should do, or which they are authorized to do. They affect, simply, the private interests of the bank, wherefore they have acquired no immunity from the usury laws of the state or territory wherein they may be located ; nor is such immunity necessary. Congressional legislation, for creating national banks, is not to be so construed as to bring it into conflict with state law ; *Nat. Bank v. Lamb et al.*, 4-585.

14. —. Immunity from the usury laws of the state is not conferred upon national banks by the act of June 3, 1864 (13 Stats. at L. 99). A contract for a loan, made in the state of New York, with such a bank, by which it reserves a greater rate of interest than is allowed by state statute, is void. *Id.*

15. —. In Ohio the discounting of a note by a national bank at a usurious rate of interest does not avoid the note in toto but only to the extent of the interest ; *National Bank v. Garlinghouse et al.*, 4-38.

16. **STATE STATUTE OF USURY.** A statute of Ohio, of March 19, 1850, an act to restrain banks from taking usury, has no application to banking institutions existing under and exercising powers by virtue of the authority of congress. *Id.*

V.

VENUE.

1. **CHANGE OF.** A corporation, equally with individuals, is entitled to a change of venue when, by a verified petition, it brings itself within the provisions of the statute ; *Commercial Ins. Co. v. Mehlman*, 1-434.

2. **WHO MAY MAKE AFFIDAVIT.** Any recognized officer of the corporation is to be regarded as a party to the record for the purpose of making the requisite affidavit. *Id.*

VICE PRESIDENT ; see **OFFICES AND OFFICERS.**

VISITORIAL POWERS.

1. **PRIVATE CORPORATIONS.** The acceptance by a voluntary society of a charter granted by the legislative power subjects it to the supervision of the proper legal authorities having jurisdiction in such cases ; *State, ex rel. Waring, v. Georgia Medical Society*, 1-328.

See **EDUCATIONAL INSTITUTIONS.**

VOLUNTARY ASSOCIATION.

1. **LIABILITY OF MEMBERS.** A promissory note signed by individuals designated as "directors" of "the Machias Mining Company," a voluntary association, by which it promised to pay Ellis M. Smith, or order, the sum named at the time specified. Held, (a) all the members of the association, if any, being liable, the action should be against all; (b) the action against the defendants alone is maintainable unless they plead, in abatement, the non joinder of their associates; *M'Greary v. Chandler et al.*, 3-355.

2. **SUBSCRIPTION TO.** One charged as a defendant, signed a paper agreeing to enter into an association for the purpose of erecting and operating a cheese factory, and, severally and individually, "to pay, to our regularly appointed building committee, the several sums set opposite our names for the purpose of building and furnishing said factory," conditioned the sum of \$2,000 be subscribed. That sum was subscribed; the associates, except defendant, paid in their subscriptions, made purchases and entered into contracts necessary for the consummation of the common enterprise. Subsequently the property and business became absorbed into a corporation, of which the subscribers became corporators; but there was no change in the purposes of the association and no liabilities were added to those assumed by the associates. It was held, (1) that the agreement was not binding while it remained unexecuted — inchoate and incomplete — there being no consideration for the promise; (2) it became binding when contracts were entered into and liabilities assumed; (3) the action could be maintained by plaintiffs, the regularly appointed building committee of the subscribers, they being under the agreement, the payees, or promisees, by description; (4) the subsequent incorporation of the associates was no defense to the action. If, thereby, defendant was damnified she must resort to her action; (5) a vote of release from the subscription, by the corporation, annulled before action had upon it, constituted no defense to the action; *Carr et al. v. Bartlett*, 7-337.

See **SUBSCRIPTION TO STOCK.**

VOLUNTARY SUBSCRIPTION.

1. **IMPLIED CONDITION OF.** Where a party promises to contribute, in aid of an improvement, in the absence of express conditions, it is implied as a condition that the improvement — as a railroad — should be constructed and operated. This being done within a reasonable time, where no time is fixed, the promise would, then, become operative and binding; and, the party making the promise would not, thereafter, be at liberty to repudiate it; *Stevens v. Corbitt*, 6-590.

2. **CONSIDERATION.** Where expense is incurred, or an obligation created under the voluntary subscription, or where the conditions on which the promise was made are fulfilled the fair inference is

that the work was done, or the expense or liability incurred, in reliance upon the subscription or promise, and the person making the same would not be permitted, thereafter, to withdraw his offer.
Id.

3. **CONSIDERATION.** A number of persons having signed an agreement to take and pay for shares in the capital stock of a corporation to be organized, under general law, for a purpose therein named, upon conditions therein specified, such agreement will constitute a good consideration for a promise on the part of a third person to pay in money toward the purpose contemplated in the agreement; and, after conditions precedent performed and the subscriber has received the benefit of the performance he will be held liable upon his promise; *Ashuelot Boot & Shoe Co. v. Hoit*, 8-383.

4. **FOR A CHURCH EDIFICE.** Defendant signed a subscription paper, by which he, and other subscribers, agreed to pay the sums set opposite their names to a treasurer, to be appointed by them, for the purpose of building a presbyterian church edifice. A treasurer was duly appointed and, at meetings, at which defendant was present and expressed no dissent, a religious society was organized, trustees elected, committees appointed and the work commenced and carried through, with defendant's knowledge and in reliance upon the subscriptions. By subsequent proceedings, promoted by the members of the society, under statute of 1813 (R. L., 1813, ch. 60), plaintiff was incorporated. In an action to enforce payment of the sum subscribed, it was held that there was a good consideration for the undertaking of defendant; that he was liable upon his subscription, and that the liability could be enforced by the treasurer appointed by the subscribers; but, in order to enable plaintiff to enforce it, it must be shown that, when the paper was in circulation for the obtaining of subscriptions or, afterward, when action was being taken upon it, it was the understanding and purpose that the edifice should become part of the temporalities of an incorporated presbyterian religious society; for, that the designation of the church edifice as presbyterian, in the subscription paper, alone, did not show such purpose, as such edifice might be used and controlled by presbyterians without the formation of a religious corporation; *Presbyterian Society of Knoxboro v. Beach*, 8-537.

5. **ACCEPTANCE NECESSARY.** A subscription in aid of the construction of a railroad, as that in consideration, that if a company shall proceed to the construction of the road, the subscribers agree to pay to such company, for which they shall have paid up stock, a certain sum of money, to be paid in instalments, the first of which when the work shall have commenced, is not a valid subscription to stock, and in the absence of a proper averment in the declaration and proof under it, that the offer it contained was accepted and acted upon, no recovery can be had on

it against subscribers; *Northern Cent. Mich. R.R. Co. v. Eslow*, **6-625**.

6. **ACCEPTANCE NECESSARY.** Where one signs a subscription paper, promising to pay a given sum toward the erection of a church building, conditioned that a certain other sum be raised, the promise stands as a mere offer, and such offer may be revoked at any time before it is acted upon. Unless there be an acceptance, as by the expenditure of money, or the incurring of legal liability on the faith of the promise, there is no right of action to recover the amount; *Beach et al. v. First Meth. Epis. Ch.*, **6-479**.

7. **ACCEPTANCE.** Demand of payment and suit instituted to recover upon a subscription in aid of corporate work, do not evidence acceptance of the subscription, if the subscription be voluntary and invalid for want of some independent consideration; *Northern Cent. Michigan R.R. Co. v. Eslow et al.*, **6-625**.

8. **WHEN BINDING.** Where a promise, or voluntary subscription, is made to some one necessarily connected with, or interested in the work being done, for the benefit of the company about to undertake, or which may have undertaken, the work of improvement, on the completion of the same, or on the performance of the conditions on which the promise was made, the liability of the promisor becomes fixed; *Stevens v. Corbitt*, **6-590**.

9. **WHEN BINDING.** A gratuitous subscription, to promote the objects for which a corporation is established, can not be enforced unless the promisee has, in reliance on the promise sued on, done some thing, or incurred or assumed some liability or obligation. It is not sufficient that others were led to subscribe by the subscription sought to be enforced; *Cottage Street Meth. Epis. Church v. Kendall, exec'r*, **7-464**.

10. —. Although the promise to pay for shares of stock in a corporation to be organized in the future is voluntary, or in the nature of a mere open proposition, when the same is accepted and acted upon by the party authorized to act in this regard, before any attempted retraction, the right to revoke is lost; *Athol Music Hall Co. v. Carey*, **7-441**.

11. **REVOKED BY OPERATION OF LAW.** A subscription to pay money toward the erection of a church building being subject to revocation until it is accepted or acted upon, and being but a continuous offer in the nature of a constant repetition, it is revoked by the want of capacity of the promisor to repeat the offer, as by reason of his death or insanity adjudged, if prior to such incapacity it had not been accepted or acted upon; *Beach et al. v. First Meth. Epis. Ch.*, **6-479**.

12. **ENFORCING CLAIM FOR.** The fact that a corporation was organized to construct an improvement at the time a promise of pecuniary aid was made, or that, even in the absence of such promise, the improvement would have been constructed, would

not be sufficient to defeat a recovery on the promise ; *Stevens v. Corbitt*, 6-590.

13. **INTEREST ON RECOVERY.** When recovery is sought by suit on a voluntary subscription, in the absence of an express agreement to pay it, interest is only recoverable after the expiration of the time expressed for payment. If the time of payment be made indefinite, or dependent on an event, which may or may not happen, interest is payable only after demand ; or in the absence of express demand, then from the date of suit instituted. *Id.*

14. **PRACTICE.** In a suit to recover on a subscription in aid of an improvement or enterprise conducted by a corporation, the transactions relating thereto and the consideration of and agreements concerning the subscription must be construed together in determining the respective obligations of the parties ; *Chapman v. Colby Bros. & Co.*, 7-578.

VOTE.

1. **STOCK.** A stockholder may vote stock standing in his own name on the books of the company, notwithstanding he may have sold the same, if such stock has not been transferred on the books at the time the vote is cast ; *People v. Robinson*, 10-59.

2. **STOCK HELD FOR CORPORATION.** Stock of a corporation held in trust for the benefit of the corporation, is subject to its order and so far as the right of voting on the shares is concerned, the holding is the same as if it were by the corporation itself. Wherefore, until they are sold and transferred, by the corporate authority, the right of voting upon them is suspended ; *American Railway Frog Co. v. Haven et al.*, 3-418.

See **ELECTION ; STOCK AND STOCKHOLDER ; TRANSFER OF STOCK.**

W.

WINDING UP.

1. **PROCESS OF ; SUIT BY RECEIVER.** A statute made it the duty of a public officer, named, when a corporation (insurance) should appear to him to be insolvent, or in such condition as to render its further proceedings hazardous to the public, to file a bill, setting forth the company's condition and praying for injunction to restrain its doing business. The law charged the court to appoint agents to take and control the company's effects, and, by final decree, in a proper case, to dissolve the corporation and wind up its affairs. Under such power the court may appoint receivers and, in making needful orders in winding up the affairs of such company, the court may direct the receiver to prosecute, in his own name, for the recovery of assets, inclusive of unpaid subscriptions to stock ; *Gill v. Balis*, 8-257.

See **EQUITY ; INSOLVENCY ; LIQUIDATION ; RECEIVER.**

WITNESS.

1. **COMPETENCY OF.** It is not necessary that a plaintiff, when offered as a witness in his own behalf, should have been a competent witness when the suit was commenced; it is sufficient if he be competent when offered; *Talladega Ins. Co. v. Landers*, **3-102**, note 1.

2. **PLAINTIFF AS.** In Alabama the act of 14th of February, 1867 (Rev. Code, § 2704), has removed the disability, imposed by the prior law, from a plaintiff, wherefore he is now permitted to be a witness in a cause against a corporation. *Id.*

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